15027

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 126.

D. MARX, APPELLANT,

vs.

WILLIAM M. EBNER AND THE EBNER GOLD MINING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

FILED AUGUST 26, 1899.

(17,499.)

(17,499.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 126.

D. MARX, APPELLANT,

vs.

WILLIAM M. EBNER AND THE EBNER GOLD MINING COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

INDEX.

	Original.	Print.
Complaint	1	1
Complaint in case of Thorp *vs.* Takou Mining and Milling Co. *et al*	3	2
Exhibit A—Mortgage from the Takou Mining and Milling Co. to Samuel Coulter, August 20, 1889	7	5
B—Deed from Samuel Coulter to Willis Thorp, November 1, 1893	12	8
C—Deed from the Takou Mining and Milling Co. to Sylvester Farrell, April 1, 1893	14	10
Summons in case of Thorp *vs.* Takou Mining and Milling Co. *et al*	17	12
Marshal's return	19	13
Affidavit for publication of summons in Thorp *vs.* Takou Mining and Milling Co. *et al*	19	14
Order for publication of summons in Thorp *vs.* Takou Mining and Milling Co. *et al*	22	15
Marshal's certificate of mailing summons in Thorp *vs.* Takou Mining and Milling Co. *et al*	23	16

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 18, 1900.

	Original.	Print.
Affidavit of publication of summons in Thorp *vs.* Takou Mining and Milling Co. *et al*	24	17
Summons in Thorp *vs.* Takou Mining and Milling Co. *et al*	25	17
Decree of foreclosure and sale in Thorp *vs.* Takou Mining and Milling Co. *et al*	26	18
Order confirming sale in Thorp *vs.* Takou Mining and Milling Co. *et al*	34	24
Subpœna	41	28
Marshal's return	42	29
Motion to quash summons, &c	43	29
Order on motion to quash, &c	44	30
Order taking demurrer under advisement	44	30
Demurrer	45	30
Decree	47	32
Assignment of errors	48	33
Order allowing appeal	51	34
Order entering of record appearance of counsel for defendant	52	35
Order granting appeal and extending time to file record	53	35
Bond	54	36
Citation (copy)	56	37
Clerk's certificate	57	37
Citation and service (original)	58	38

1 In the District Court of the United States for the District of Alaska.

D. MARX, Plaintiff,
vs.
THE EBNER GOLD MINING COMPANY and W. M. EBNER, Defendants.

Complaint.

D. Marx, the above-named plaintiff, complains of the Ebner Gold Mining Company and W. M. Ebner, the defendants herein named, and for cause of suit against said defendants alleges:

I.

That the defendant The Ebner Gold Mining Company is a corporation duly organized and existing within the district of Alaska.

II.

That on the 2nd day of August, 1889, the Takou Mining and Milling Company was a corporation organized under the laws of Oregon, and on said 2nd day of August, 1889, was the owner and in possession of the following-described property, mines, mining property, mill, and appliances, viz:

All the following-described leads, lodes, and mining claims and real property lying and being on the east side of Gold creek, in the Harris mining district and in the Juneau recording district of Alaska, viz., "the relocated Pilz No. 2," the "Jewel" Lode claim; also the "Grand Review" Lode claim; also the "Golden Place" Lode claim; also the "Lotta" Lode claim; also the "Keystone" Lode claim; also the "Juneau" Lode claim; also the "Crown Point" Lode claim; also the "Gold Mill" Lode claim; also the "Capital" Lode claim; also the "Takou Gold and Silver" Lode claim; also the "Takou Union" Lode claim.

III.

That on said 2nd day of August, 1889, the said Takou Mining and Milling Company for a valuable, good, and sufficient consideration made, executed, and delivered to Samuel Coulter its promissory note for the sum of ninety-eight thousand four hundred and
2 five and $\frac{91}{100}$ dollars ($98,405.91), payable ninety days from the date thereof, and in order to and for the purpose of securing the payment of said note according to the terms thereof the said Takou Mining and Milling Company duly made, executed, and delivered to said Samuel Coulter a mortgage upon said property hereinbefore described.

IV.

That said note and mortgage were both executed and delivered to said Samuel Coulter in accordance with and pursuant to a resolu-

tion of the board of directors of said Takou Mining and Milling Company theretofore duly made and passed.

V.

That thereafter and on the 1st day of April, 1893, said Takou Mining and Milling Company, in accordance with a resolution of its board of directors, made, executed, and delivered to Sylvester Farrell a good and sufficient deed of conveyance of all the property hereinbefore described, except the relocated Pilz No. 2 Lode claim, the Juneau Lode claim, the Golden Place Lode claim, the Capital Lode claim, and the Takou Union Lode claim, which said deed was entitled to be and was duly recorded in the Juneau recording district of Alaska on the 9 day of Sept., 1893.

VI.

That thereafter and on or about the 1st day of September, 1893, said Samuel Coulter, for a valuable consideration, sold and assigned said note and mortgage executed by the Takou Mining and Milling Company to Samuel Coulter, as hereinbefore alleged, to Willis Thorp.

VII.

That thereafter said Thorp, desiring and intending to fore-
3 close said mortgage, did on December 21, 1893, file with the clerk of the district court for the district of Alaska a paper intended as a complaint, of which the following is a copy, viz:

In the United States District Court for the District of Alaska.

WILLIS THORP, Plaintiff.
vs.
THE TAKOU MINING AND MILLING COMPANY, a Corporation, and Sylvester Farrell, Defendants.

The plaintiff complains and alleges:

1.

That the defendant Takou Mining and Milling Company is a private corporation organized and existing under and by virtue of the laws of the State of Oregon, having its principal place of business in the city of Portland, in said State, and having its mines and quartz stamp mill in the district of Alaska, on the premises herein described.

2.

That on the 20th day of August, 1889, at Portland, Oregon, the defendant the said Takou Mining and Milling Company made its promissory note, bearing date on that day, in the words and figures following, to wit:

$98,405.91. PORTLAND, OREGON *August* 20, 1889.

Ninety days after date, without grace, the Takou Mining and Milling Company promises to pay to the order of Samuel Coulter, at Portland, Oregon, the sum of ninety-eight thousand four hundred and five and $\frac{91}{100}$ ($98,405.91) dollars in gold coin of the United States of America, with interest thereon in like gold coin, at the rate of eight per cent. per annum, from date until paid, for value received, and in case suit or action is instituted to collect this
4 note or any portion thereof the said company promises to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit or action.

THE TAKOU MINING AND
MILLING COMPANY,
By SAMUEL COULTER, *President.*
THE TAKOU MINING AND
MILLING COMPANY,
By W. T. HUME, *Secretary.*

3.

That the said defendant, said Takou Mining and Milling Company, to secure the payment of said principal sum and the interest thereon, as mentioned in said note, according to the tenor thereof, did execute under its corporate seal and by order of the board of directors of said defendant, the said Takou Mining and Milling Company, and deliver to said Samuel Coulter, mortgagee, a certain mortgage bearing date the 20th day of August, 1889, and conditioned for the payment of said sum of $98,405.91, and interest thereon at the rate and at the time and in the manner specified in said note and according to the conditions thereof; which said mortgage was duly acknowledged and certified so as to entitle*d* it to be recorded, and the same was afterwards, to wit, on the 9th day of September, 1889, recorded in the office of the recorder for the Juneau recording district, Alaska, in Liber "E," on page 485, a copy of which said mortgage, with the indorsements thereon, is hereunto annexed, marked "Exhibit A," and made a part of this complaint.

(3.)

That on the first day of September, 1893, the said Samuel Coulter, mortgagee, granted, bargained, sold, assigned, transferred, and set over unto the plaintiff herein the said mortgage hereinbefore mentioned and marked "Exhibit A;" which said assignment of said mortgage was duly executed and acknowledged and certified so as to entitle it to be recorded, and the same was afterwards, to wit, on the 20th day of November, 1893, recorded in the office of the recorder for said Juneau recording district, Alaska, in Liber "O," on
5 page 681, a copy of which said assignment of said mortgage, with the indorsements thereon, is hereunto annexed, marked "Exhibit B," and made a part of this complaint.

(4)

That on or about the first day of April, 1893, the said defendant, The Takou Mining and Milling Company, granted, bargained, sold, and conveyed to the defendant Sylvester Farrell the following-named lode mining claims, mill sites, and water right described in said mortgage, to wit, the Jewel Lode claim, the Grand Review Lode claim, the Golden Fleece Lode claim, the Lotta Lode claim, the Keystone Lode claim, the Crown Point Lode claim, and the Takou Gold and Silver Lode claim, together with all and singular the mill sites, flumes, and water rights to said lode claims belonging and held in connection therewith, which said conveyance or deed was recorded in the office of the recorder of said Juneau recording district on the 9th day of September, 1893, in Liber "O," on page 619, a copy of which said deed or conveyance, with the indorsements thereon, is hereunto annexed, marked "Exhibit C," and made a part of this complaint.

(5.)

That no proceedings have been had at law or otherwise for the recovery of said money or any part thereof.

(6.)

That the principal sum mentioned in said promissory note and mortgage, together with the interest thereon, at the rate of eight per cent. per annum, from the 20th day of August, 1889, has not been paid by said defendants, nor any part thereof.

(7.)

That the plaintiff is now the lawful owner and holder of said promissory note and mortgage.

(8.)

That by reason of the foreclosure proceedings herein the plaintiff was compelled to incur the expense of the sum of $250.00 for attorneys' fees.

Wherefore the plaintiff prays judgment against the said
6 defendants:

First. For the sum of ninety-eight thousand four hundred and five and $\frac{91}{100}$ dollars, with interest, at the rate of eight per cent. per annum, from the 20th day of August, 1889, together with $250.00 attorneys' fees and for costs of suit.

Second. That the usual decree may be made for the sale of said premises by the U. S. marshal for the district of Alaska according to law and the practise of this court; that the proceeds of said sale may be applied in payment of the amount due to plaintiff, and that said defendants and all persons claiming under them or either of them subsequent to the execution of said mortgage upon said premises, either as purchasers, incumbrancers, or otherwise, may be barred and foreclosed of all right, claim, or equity of redemption in the said premises and every part thereof, and that the said plaintiff may have

judgment and execution against said defendant, said Takou Mining and Milling Company, for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment.

Third. That the plaintiff or any other party to the suit may become a purchaser at said sale; that the U. S. marshal execute a deed to the purchaser; that the said purchaser be let into the possession of the premises on production of the U. S. marshal's deed therefore, and that plaintiff have such other or further relief in the premises as to this court may seem meet and equitable.

JOHN G. HEID,
Attorney for Plaintiff.

UNITED STATES,)
District of Alaska,) ss:

John G. Heid, being first duly sworn, says: I am the attorney of the plaintiff in this suit. I have read the foregoing complaint and know the contents thereof, and the same is true of my own knowledge except as to the matters therein averred to be upon information and belief, and as to these matters I believe it to be true; that the material allegations of the complaint are within my personal knowledge.

The reason why the verification is not made by the plaintiff is that he is not within the district of Alaska, which is the district where I reside.

JOHN G. HEID.

Subscribed and sworn to before me this 18th day of December, 1893.

[NOTARIAL SEAL.]

F. D. KELSEY,
Notary Public for Alaska.

"EXHIBIT A."

This indenture, made this 20th day of August, A. D. 1889, by and between the Takou Mining and Milling Company, a corporation duly incorporated, organized and existing under and by virtue of the laws of the State of Oregon, party of the first part and Samuel Coulter, of the city of Portland, Oregon, party of the second part,

Witnesseth: that the said party of the first part for and in consideration of the sum of ninety-eight thousand four hundred and five and $\frac{91}{100}$ (98,405.91) dollars, to *wit* in hand paid, receipt whereof is hereby acknowledged has bargained, sold, assigned, conveyed and confirmed and by these presents does hereby bargain, sell, assign, transfer, convey and confirm unto the said party of the second part, his heirs and assigns forever all and singular all its rights, title and interest in and to the following-described leads, lodes, and mining claims situated, lying and being in the east side of Gold creek, in Harris mining district, and district of Alaska, to wit:

8 The "Relocated Pilz No. 2" Lode claim, recorded in Book I of Quartz Locations on page 9, of the records of said Harris mining district; also the "Jewel" Lode claim, recorded in Book I of Quartz Locations on page —, of the records of said Harris mining district; also the "Grand Review" Lode claim recorded in Book I of Quartz Locations on page 23, of the records of said Harris mining district; also the "Golden Fleece" Lode claim recorded in Book I of Quartz Locations on page 59 of the records of said Harris mining district; also the Lotta Lode claim, recorded in said Book I of Quartz Locations on page —, of the records of said Harris mining district; also the Keystone Lode claim recorded in Book B of records on page 20, of the records of said Harris mining district; also the Juneau Lode claim, recorded in said Book B of Records on page 21, of said records of said Harris mining district; also the Crown Point Lode claim, recorded in said Book B of Records on page 35, of said records of said Harris mining district; also the Gold Hill Lode claim, recorded in said Book B, of Records on page 36 of records of said Harris mining district; also the Capital Lode claim, recorded in said Book B of Records on page 62 of said records of said Harris mining district; also the Takou Gold and Silver Lode claim, recorded in Book A of Records on page 56 and 118, respectively, of the records of said Harris mining district; also the Takou Union Lode claim, recorded in Book A of Records, on page 56 and 118, respectively, of the records of said Harris mining district, less 10 feet in and to said Takou lode owned by Selim E. Woodworth. For greater certainty of description of said lode claim reference is hereby made to said records of said Harris mining district;

Together with all and singular the mill sites, flumes and water rights, dips, spurs and angles and also all the metals, ores, gold and silver bearing quartz, rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining, and the rents, issues and

9 profits thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first — of, in or to said premises and every part and parcel thereof with the appurtenances.

To have and to hold the above-described premises together with the appurtenances and privileges thereunto incident unto the said Samuel Coulter, his heirs and assigns forever.

This conveyance is intended as a mortgage to secure the payment of the sum of ninety-eight thousand four hundred and five and $\frac{91}{100}$ ($98,405.91) dollars, in accordance with the tenor of a certain promissory note, of which the following is substantially a copy, to wit:

$98,405.91. PORTLAND, OREGON, *August* 20, 1889.

Ninety days after date without grace the Takou Mining and Milling Company promises to pay to the order of Samuel Coulter, at

Portland, Oregon, the sum of ninety-eight thousand four hundred and five and $^{91}_{100}$ (98,405.91) dollars, in gold coin of the United States of America, with interest thereon in like gold coin, at the rate of eight per cent. per annum from date until paid, for value received; and in case suit or action is instituted to collect this note or any portion thereof the said company promises to pay such additional sum as the court may adjudge reasonable as attorneys' fees in said suit or action.

THE TAKOU MINING AND MILLING COMPANY,
By SAMUEL COULTER, *President.*
THE TAKOU MINING AND MILLING COMPANY,
By W. T. HUME, *Secretary.*

Now, therefore, if the said promissory note, principal and interest, shall be paid at maturity, according to the terms thereof this indenture shall be void, but in case default shall be made in the payment of the principal or interest as above provided, then and in that case the whole sum, both principal and interest accrued at the time default is made, shall become due and payable and the party of the second part, his executors, administrators and assigns are hereby empowered to foreclose this mortgage in the manner prescribed by law.

And the party of the first part for itself, its successors and assigns does hereby covenant, promise and agree to pay unto said party of the second part, his executors, administrators and assigns the said sum of money as in said note provided.

In testimony whereof, the said Takou Mining and Milling Company has by resolution of its board of directors, caused these presents to be executed by its president and secretary and its corporate seal to be affixed this the 20th day of August, A. D. 1889.

THE TAKOU MINING AND MILLING COMPANY,
[CORPORATE SEAL.] By SAMUEL COULTER, *President.*
THE TAKOU MINING AND MILLING COMPANY,
By W. T. HUME, *Secretary.*

Executed in presence of—
R. G. MORROW.
GEO. H. DURHAM.

STATE OF OREGON, }
Multnomah County, } *ss:*

Be it remembered that on this 20th day of August, A. D. 1889, before me, the undersigned, a notary public in and for the State and county aforesaid, personally appeared Samuel Coulter, president of the Takou Mining and Milling Company, and W. T. Hume, secretary of said Takou Mining and Milling Company, whose names are subscribed to the foregoing instrument as parties thereto and as

president and secretary of said company, both personally known to me to be the individuals named and described in and who executed the said instrument, and they severally acknowledged to me that he, the same Samuel Coulter, as president, and he, the said W. T. Hume, as secretary, of the said The Takou Mining and Mill-
11 ing Company executed the foregoing instrument as and for the act and deed of said The Takou Mining and Milling Company freely and voluntarily and for the uses and purposes therein mentioned, and he, said W. T. Hume, being by me first duly sworn, did depose and say that he is the secretary of the said The Takou Mining and Milling Company, and resides at Portland, Oregon; that he — the legal custodian of and is acquainted with and has in his possession the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that the same was so fixed by him as secretary of said company on the 20th day of August, A. D. 1889, by order of the board of directors of said company, and that he signed his name thereto by the like order of the board of directors of said company.

In witness whereof I have hereunto set my hand and affixed my official seal this the day and year in this certificate first above written.

[NOTARIAL SEAL.] R. G. MORROW,
Notary Public for Oregon.

(Endorsed:) Mortgage. The Takou Mining and Milling Company to Samuel Coulter. Dated August 20th, 1889.

DISTRICT OF ALASKA, } ss:
Juneau Recording District, }

The within instrument was filed for record at 4.10 o'clock p. m., September 9th, 1889, and duly recorded in Book E, on page 485, of the records of said district.

LOUIS L. WILLIAMS.

12 "EXHIBIT B."

Know all men by these presents, that Samuel Coulter, of Portland, Oregon, the party of the first part, for and in consideration of the sum of two thousand dollars, gold coin of the United States of America, to him in hand paid by Willis Thorp, of Juneau, in the Territory of Alaska, the party of the second part, the receipt of which is hereby acknowledged has granted, bargained, sold, assigned, transferred, and set over, and by these presents does grant, bargain, sell, assign, transfer, and set over, unto the said party of the second part, a certain indenture of mortgage, bearing date the 20th day of August, A. D. one thousand eight hundred and eighty-nine made and executed by the Takou Mining and Milling Company, a corporation, by Samuel Coulter, its president and W. T. Hume, its secretary, to the said party of the first part, to secure the payment of the sum of ninety-eight thousand four hundred five and $\frac{91}{100}$ ($98,405.91) dollars, together with the note or obligation therein described and the

money due, or to grow due thereon, with the interest; which said indenture of mortgage was recorded in the office of the district recorder of the Juneau recording district in the district of Alaska in Book E of the records of said district, page 485 on the 9th day of September A. D. 1889.

To have and to hold, the same unto the said party of the second part, his executors, administrators and assigns, for his use and benefit, subject only to the proviso in said indenture of mortgage mentioned.

And the said party of the first part does hereby covenant to and with the said party of the second part that the said party of the first part is the lawful owner and holder of the said note and mortgage, and that he has the right to sell, transfer and assign the same as aforesaid, and that there is now due and owing upon the said
13 note and mortgage the sum of ninety-eight thousand and four hundred five and $\frac{91}{100}$ dollars with interest from the 20th day of August A. D. one thousand eight hundred and eighty-nine.

In witness whereof the said party of the first part has hereunto set his hand and seal the — day of ——, A. D. one thousand eight hundred and ninety-three.

SAMUEL COULTER.

Signed, sealed, and delivered in the presence of—
JOHN H. HALL.
JOS. W. SCHNABEL.

STATE OF OREGON, }
County of Multnomah, } *ss*:

This certifys that on this first day of November, A. D. 1893, before me, the undersigned, a notary public in and for said county and State, personally appeared the within-named Samuel Coulter, personally known to me to be the identical person described in and who executed the within instrument, and acknowledged to me that — executed the same, and there acknowledged to me that he executed the same freely and voluntarily and without fear, coersion, or compulsion from any one.

In testimony whereof I have hereunto set my hand and notarial seal the day and year last above written.

[NOTARIAL SEAL.]

JOHN H. HALL,
Notary Public for Oregon.

Endorsed.

DISTRICT OF ALASKA, }
Juneau Recording District, } *ss*:

The within instrument was filed for record at 10.20 o'clock a. m., November 20th, 1893, and duly recorded in Book O, on page 681, of the records of said district.

Compared.

W. R. HOYT,
District Recorder.

14 "EXHIBIT C."

Know all men by these presents, that the Takou Mining and Milling Company, a corporation organized and existing under the laws of the State of Oregon, having its principal place of business at the city of Portland in the State of Oregon, in consideration of the sum of twenty-five thousand dollars to *w*it in hand paid by Sylvester Farrell, has bargained and sold and by these presents does grant, bargain, sell and convey unto the said Sylvester Farrell, his heirs and assigns, all the following-described leads, lodes and mining claims and real property, lying and being on the east side of Gold creek in Harris mining district, and district of Alaska, to wit: All that certain lead, lode and mining claim known as the "Jewel" Lode claim, recorded in Book "I" of Quartz Locations on page — of said records of said Harris mining district; also the "Grand Review" Lode claim, recorded in Book "I" of Quartz Locations on page 23 of the records of said Harris mining district, also the "Golden Fleece" Lode claim, recorded in Book "I" of Quartz Locations on page 59 of records of said Harris mining district, also all of the "Lotta" Lode claim, recorded in Book "I" of Quartz Locations on page — of records of said Harris mining district, also all of the "Keystone" Lode claim, recorded in Book "B" of Records on page 20 of the records of said Harris mining district; also all of the "Crown Point" Lode claim, recorded in said Book "B" of Records on page 35 of said records of said Harris mining district; also the Takou "Gold and Silver" Lode claim, recorded in Book "A" of Records on page 56 and 118, respectively, of the records of said Harris mining district, and for greater certainty of description of said lode claim, reference is hereby made to said records of said Harris mining district.

Together with all and singular, the mill sites, flumes and water rights, dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz rock and earth therein, and all the rights, privileges and franchises thereto incident, appending and appurtaining or therewith usually had and enjoyed, and also all and singular the tenements and hereditaments and appurtenances thereunto belonging or in anywise appurtaining and the rents, issues and profits thereof, and also all the estate, right, title, property, possession, claim and demand whatsoever, as well in law as in equity of the said Takou Mining and Milling Company to the said premises and every part and parcel thereof.

To have and to hold the above-described premises, together with the appurtenances and privileges thereto incident unto the said Sylvester Farrell, his heirs and assigns forever, and the said Takou Mining and Milling Company, a corporation, as aforesaid, *it is* hereby covenanted to and with said Sylvester Farrell, his heirs and assigns, that it will and its successors and assigns shall warrant and forever defend the above-granted premises, privileges, leads and lodes and mining claims and every part and parcel thereof against the lawful claims and demands of all persons whomsoever.

In witness whereof the said Takou Mining and Milling Company has by resolution of its board of directors caused these presents to be executed by its president and secretary and its corporate seal to be hereunto affixed this 1st day of April, 1893.

TAKOU MINING AND MILLING COMPANY,

[SEAL.] By SAMUEL COULTER, *President.*

TAKOU MINING AND MILLING COMPANY,

By W. T. HUMES, *Secretary.*

Signed, sealed, and delivered in presence of—

JOS. W. SCHNABEL.
J. J. FITZGERALD.

16 STATE OF OREGON, } ss:
County of Multnomah, }

Be it remembered that on this 1st day of April, before me, the undersigned, a notary public in and for the county of Multnomah, State of Oregon, duly commissioned and qualified, personally came Samuel L. Coulter, president, and W. T. Hume, secretary, of the Takou Mining and Milling Company, whose names are subscribed to the foregoing instrument as parties thereto, and as such president and as such secretary of said Takou Mining and Milling Company, both personally known to me to be the individuals named and described in and who executed the said instrument, and they severally acknowledged to me that he, the said Samuel L. Coulter, as such president, and he, the said W. T. Hume, as such secretary, of the Takou Mining and Milling Company, executed the foregoing instrument as such, and for the act and deed of said Takou Mining and Milling Company, freely and voluntarily for the uses and purposes therein mentioned; and he, the said W. T. Hume, being by me duly sworn, did depose and say that he is the secretary of the Takou Mining and Milling Company and resides at Portland, Oregon; that he is the legal custodian and is acquainted with and has in his possession the corporate seal of the Takou Mining and Milling Company; that the seal affixed to the foregoing instrument is said corporate seal; that the same was affixed by him as such secretary of said company on the 1st day of April, A. D. 1893, by order of the board of directors of said company, and that he signed his name thereto by the like order of the board of directors of said company.

In witness whereof I have hereunto set my hand and affixed my official seal, at Portland, Oregon, the date first above written.

[NOTARIAL SEAL.] JOS. W. SCHNABEL,
Notary Public for Oregon.

17 *Warranty Deed.*

Takou Mining and Milling Company
to
Sylvester Farrell.

DISTRICT OF ALASKA, }
Juneau Recording District. }

The within instrument was filed for record at 11 o'clock a. m. September 9th, 1893, and duly recorded in Book "O," on page 619, of the records of said district.

W. R. HOYT,
District Recorder.

(Said complaint is endorsed as follows:) No. 393. In U. S. district court for the district of Alaska. Willis Thorp, plaintiff, *vs.* Takou Mining & Milling Co., Sylvester Farrell, defendants. Complaint. Filed Dec. 21, 1893. N. R. Peckinpagh, clerk. Office of John G. Heid, attorney, Juneau, Alaska.

That on December 21, 1893, the clerk of said court issued and delivered to the marshal of said district a paper, and the marshal on January 2, 1894, returned said paper to the said clerk with said marshal's return thereon, as appears by said paper, a copy of which paper and return is as follows, viz:

In the United States District Court for the District of Alaska.

WILLIS THORP *vs.* THE TAKOU MINING AND MILLING COMPANY, a Private Corporation, and Sylvester Farrell.	No. 393.	Summons.

18 The President of the United States of America to The Takou Mining and Milling Company, a private corporation, and Sylvester Farrell, the above-named defendant-, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Sitka, in said district, and answer the complaint filed against you in the above-entitled action within 20 days from the date of the service of this summons upon you, and if you fail so to appear and answer, for want thereof the plaintiff will apply to the court for the relief demanded in said complaint.

The said action is brought to obtain a decree of this court for the foreclosure of a certain mortgage described in the said complaint and executed by the said defendant, said Takou Mining and Milling Company, on the 20th day of August, 1889, to secure the payment of one certain promissory note; that the premises conveyed by said mortgage may be sold and the proceeds applied to the payment of said promissory note, and in case such proceeds are not sufficient to

pay the same, then to obtain an execution against said defendant, said Takou Mining and Milling Company, for the balance remaining due, and also that the said defendants and all persons claiming by, through, or under them may be barred and foreclosed of all right, title, claim, lien, equity of redemption, and interest in and to said mortgaged premises; for $250.00 attorneys' fees and costs of suit, and for other and further relief, as will more fully appear by reference to the complaint of file herein.

And this is to command you, the marshal of said district, or your deputy to make due service and return of this summons. Hereof fail not.

Witness the Honorable Warren Truitt, judge of said district court, and the seal of said court, affixed at Sitka, in said district, 21 day of December, 1893.

[CLERK'S SEAL.] N. R. PECKINPAGH, *Clerk.*

JOHN G. HEID,
Att'y for Plaintiff, Juneau, Alaska.

19 (The following return appears upon the summons:)

UNITED STATES OF AMERICA, } ss:
District of Alaska, }

I hereby certify that the within summons came into my hands for service on the 22d day of December, 1893, and that after due and diligent search neither of the within-named defendants nor their agents could be found within this district.

Dated at Juneau, Alaska, this 2d day of January, 1894.

ORVILLE T. PORTER,
United States Marshal.
By MAX ENDELMAN,
Deputy United States Marshal.

Fees: Return of summons and comp., $2.00.

(Said summons was endorsed as follows:) No. 393. In the district court of the United States for the district of Alaska. Willis Thorp *vs.* The Takou Mining and Milling Company and Sylvester Farrell. Summons. Returned and filed January 5, 1894. N. R. Peckinpagh, clerk.

That on January 3, 1894, said Thorp filed with said clerk a paper, a copy of which is as follows, viz:

In the United States District Court for the District of Alaska.

WILLIS THORP, Plaintiff,
vs.
THE TAKOU MINING AND MILLING COMPANY and SYLVESTER FARRELL, Defendants.

UNITED STATES, *District of Alaska*, } *ss*:

John G. Heid, being duly sworn, says as follows:

1. I am the attorney for the plaintiff in the above-entitled suit. The reason why this affidavit is not made by the plaintiff in *propria persona* is that said plaintiff is, though a resident of Alaska, not at present within the district of Alaska; that the material allegations contained in the complaint filed herein come within my personal knowledge; that the complaint in said action or suit was duly filed with the clerk of this court on the — day of December, 1893, and summons thereupon issued, and the said action is brought for the purpose of obtaining a decree of this court for the foreclosure of a certain mortgage described in the complaint filed herein and executed by the said defendant, the said Takou Mining and Milling Company, on the 20th day of August, 1889, to secure the payment of a certain promissory note for the sum of $98,405.91 to one Samuel Coulter and assigned, sold, and set over by said Samuel Coulter to the plaintiff herein, the property and premises conveyed by said mortgage being the following-named lode claims and mining rights, situated on Gold creek, in Harris mining district and district of Alaska, to wit, the relocated Pilz No. 2 Lode claim, the Jewel Lode claim, the Grand Review Lode claim, the Golden Fleece Lode claim, the Lotta Lode claim, the Keystone Lode claim, the Juneau Lode claim, the Crown Point Lode claim, the Gold Hill Lode claim, the Capital Lode claim, the Takou Gold and Silver Lode claim, and the Takou Union Lode claim, together with all and singular the mill sites, flumes, and water rights thereto belonging or held in connection therewith. The cause of action is fully set forth in the verified complaint of plaintiff on file herein.

2. That the defendant the said Takou Mining and Milling Company is a foreign corporation, organized and existing under the laws of the State of Oregon, and has and owns said relocated Pilz No. 2 Lode claim, said Juneau Lode claim, said Gold Hill Lode claim, said Capital Lode claim, and said Takou Union Lode claim; that the defendant said Sylvester Farrell is not a resident of the district of Alaska, but resides in the city of Portland, Oregon, and owns (subject to said mortgage) the said Jewel Lode claim, said Grand Review Lode claim, said Golden Fleece Lode claim, said Lotta Lode claim, said Keystone Lode claim, said Crown Point Lode claim, and said Takou Gold and Silver Lode claim, which said last-mentioned lode claim the said defendant, Farrell, purchased from said defendant, said Takou Mining and Milling Company, subsequent to the execution of said mortgage.

3. That no officer of said defendant corporation, the said Takou

Mining and Milling Company, resides within the district of Alaska; that the said defendant corporation has no managing agent or representative within the said district of Alaska; that the president of said defendant corporation is Samuel Coulter, whose post-office address is No. 246 Washington street, Portland, Oregon; that the post-office address of said defendant, Sylvester Farrell, is Portland, Oregon, where said defendant, Farrell, resides; that affiant is ignorant of the residence number of said defendant, Farrell, if any he has.

4. That a summons was duly issued out of this court to the United States marshal for the district of Alaska, with directions to said U. S. marshal to serve the same upon said defendants, and the said U. S. marshal has returned the same to the clerk of this court with his return thereon indorsed to the effect that the said defendants or either of them could not be found in his district.

5. That the plaintiff herein has a good cause of action in this suit against the said defendant, as will fully appear by the verified complaint on file herein, to which reference is hereby made, and the said defendants, said Takou Mining and Milling Company and said Sylvester Farrell, are necessary and proper parties defendant thereto, as I verily believe.

6. Personal service of said summons cannot be made on the said defendant, and plaintiff therefor- demands an order that service of the same may be made by publication.

JOHN G. HEID.

Subscribed and sworn to before me this 3rd day of January, 1894.

[NOTARIAL SEAL.] F. D. KELSEY,
Notary Public for Alaska.

22 (Endorsed:) No. 393. In U. S. dist. court, dist. of Alaska. Willis Thorp *vs.* Takou M. & M. Co. and Sylvester Farrell. Affidavit for publication of summons. Filed Jan'y 5, 1894. N. R. Peckinpagh, clerk.

That *in* April 4, 1894, said Thorp filed with said clerk two papers, of which the following are copies, viz:

In the United States District Court for the District of Alaska.

WILLIS THORP, Plaintiff,
vs.
THE TAKOU MINING AND MILLING COMPANY and SYLVESTER FARRELL, Defendants. } Order.

Upon reading and filing the affidavit of John G. Heid, attorney for plaintiff herein, and it satisfactorily appearing therefrom to me, the judge of the district court of the United States for the district of Alaska, that the defendants reside out of this district and cannot after due diligence be found therein, and it appearing from the affidavit aforesaid that a cause of action exists in this action in favor of the plaintiff therein and against the said defendants, and that the said defendants, said Takou Mining and Milling Company and said

Sylvester Farrell, are necessary and proper parties defendant thereto, and it further appearing that a summons has been duly issued out of said court in this action, and that personal service of the same cannot be made upon the said defendants for the reasons hereinbefore contained and by the said affidavit made to appear, on motion of John G. Heid, Esq., attorney for plaintiff, it is ordered that the service of the summons in this action be made upon the defendants by publication thereof in the "Juneau City Mining Record," a newspaper published at Juneau, Alaska, hereby designated as the newspaper most likely to give notice to said defendants, that such publication be made at least once a week for 8 weeks.

23 And it further in like manner satisfactorily appearing to me that the residence of said defendant, Sylvester Farrell, is known to be at the city of Portland, the State of Oregon, and that the residence of the president of said defendant, said Takou Mining and Milling Company, to wit, Samuel Coulter, is known to be No. 246 Washington street, at the city of Portland, Oregon, it is ordered that a copy of the summons and a copy of the complaint in this action be forthwith deposited in the post-office, postpaid, directed to each of said defendants at their places of residence.

Dated January —, 1894.

WARREN TRUITT,
Judge of the United States District Court for the District of Alaska.

(Endorsed:) No. 393. In U. S. dist. court for dist. of Alaska. Willis Thorp *vs.* Takou M. & M. Co. and Sylvester Farrell. Order for publication of summons. Filed January 5, 1894. N. R. Peckinpagh, clerk.

District Court of the United States, District of Alaska.

WILLIS THORP
vs. } No. 393.
TAKOU M. & M. CO. and SYLVESTER FARRELL.

I hereby certify that in obedience of an order from the district court of the United States for the district of Alaska bearing date January 5, 1894, that I deposited in the post-office at Sitka, in said district, postpaid, on the 8th day of January, 1894, a copy of the complaint and summons addressed to Samuel Coulter, president Takou M. & M. Co., 246 Washington street, Portland, Oregon, and a copy of the complaint and summons addressed to Sylvester Farrell at Portland, Oregon.

ORVILLE T. PORTER,
U. S. Marshal.
By A. MEYER, *Deputy.*

Fees, $4.00.

24 (Endorsed:) No. 393. District court of U. S., dist. of Alaska. Willis Thorp *vs.* Takou M. & M. Co. and Sylvester Farrell. Marshal's certificate as to depositing copies of complaint and summons in post-office. Filed January 11, 1894. N. R. Peckinpagh, clerk.

That on April 4, 1894, said Thorp filed with the clerk of said court a paper, of which the following is a copy:

In the United States District Court for the District of Alaska.

WILLIS THORP, Plaintiff, *vs.* THE TAKOU MINING & MILLING COMPANY, a Private Corporation, and Sylvester Farrell, Defendants.	No. 393. Affidavit of Publication of Summons.

UNITED STATES, *District of Alaska,* } *ss:*

E. Otis Smith, of the town of Juneau, in the district of Alaska, being duly sworn, deposes and says as follows:

I. I am a citizen of the United States, and at all times hereinafter mentioned was over eighteen years of age, and am not a party to the above-entitled action.

II. I am the printer and publisher of the weekly newspaper printed and published in the town of Juneau, said district of Alaska, known as the "Juneau City Mining Record."

III. The summons of which the annexed is a printed copy was published in said newspaper once a week for nine consecutive weeks, commencing on the 13th day of January, 1894, and ending on the 17th day of March, 1894.

E. OTIS SMITH.

Subscribed and sworn to before me this 30th day of March, 1894.
[NOTARIAL SEAL.]
F. D. KELSEY,
Notary Public for Alaska.

25 *Summons.*

In the District Court of the United States for the District of Alaska.

WILLIS THORP *vs.* THE TAKOU MINING AND MILLING COMPANY, a Private Corporation, and Sylvester Farrell.	No. 393. Summons.

The President of the United States of America to The Takou Mining and Milling Company, a private corporation, and Sylvester Farrell, the above-named defendants, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Sitka, in said district, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this summons upon you, to wit, within twenty days from the 5th day of March, 1894, and if you fail so to appear and answer for want thereof the plaintiff will apply to the court for the relief demanded in the said complaint.

The said action is brought to obtain a decree of this court for the foreclosure of a certain mortgage described in said complaint and executed by the said defendant, said Takou Mining and Milling Company, on the 20th day of August, 1889, to secure the payment of one certain promissory note, that the premises conveyed by said mortgage may be sold and the proceeds applied to the payment of said promissory note, and in case such proceeds are not sufficient to pay the same, then to obtain an execution against said defendant, said Takou Mining and Milling Company, for the balance remaining due, and also that the said defendants and all persons claiming by, through, or under them may be barred and foreclosed of all right, title, claim, lien, equity of redemption, and interest in
26 and to said mortgaged premises for $250, attorney's fee, and costs of suit, and for other and further relief, as will more fully appear by reference to the complaint on file herein.

Order for publication made January 5th, 1894.

And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable Warren Truitt, judge of said district court, and the seal of said court affixed, at Sitka, in said district, this 5th day of January, 1894.

N. R. PECKINPAGH, *Clerk.*

J. G. HEID,
Att'y for Plaintiff, Juneau, Alaska.

(Endorsed:) No. 393. In U. S. dist. court, district of Alaska. Willis Thorp, pl'ff, *vs.* The Takou Mining and Milling Company and Sylvester Farrell, def't-. Affidavit of publication of summons. Filed April 4, 1894. Charles D. Rogers, clerk.

XI.

That on June 7, 1895, said Thorp filed with said clerk and had entered and spread upon the records of said court a paper, of which the following is a copy, viz:

In the District Court of the United States for the District of Alaska.

WILLIS THORP, Plaintiff, *vs.* TAKOU MINING AND MILLING COMPANY, a Corporation, and Sylvester Farrell, Defendants, and John W. Irvin, Plaintiff in Intervention.	No. 393. Judgement and Decree of Foreclosure and Sale.

This cause having this day been brought on to be heard upon the complaint filed herein and John W. Irvin having heretofore and on,
27 to wit, the 22nd day of January, 1894, filed his complaint in intervention in this action, claiming priority over the plaintiff's mortgage set forth and described in plaintiff's complaint, and the plaintiff having heretofore and on, to wit, the 2nd

day of January, 1895, duly served and filed his demurrer to the complaint in intervention of the said John W. Irvin, and said demurrer coming on regularly to be heard before Honorable Warren Truitt, judge of said court, at Juneau, on the 11th day of May, 1895; and—

Whereas the said demurrer was by the said court on the 29th day of May, 1895, sustained and an order sustaining said demurrer duly entered thereon on the 31st day of May, 1895, and in said order sustaining plaintiff's said demurrer complainant in intervention, John W. Irvin, was allowed to file an amended complaint in intervention on or before June 3rd, 1895, and he having this day filed an amended and supplemental complaint of intervention herein; and it appearing to the satisfaction of the court from due proofs that the defendants, The Takou Mining and Milling Company, a corporation, and Sylvester Farrell, were duly, regularly, and legally served with summons and complaint in this action; and—

It further appearing that the said defendants and each of them failed to appear, answer, or demur to the plaintiff's complaint herein and now on file in this action within the time allowed by law;

And the plaintiff herein having heretofore and on, to wit, the 4th day of May, 1894, at Sitka, Alaska, duly obtained and entered an order of default against the defendants, The Takou Mining and Milling Company and Sylvester Farrell, and the note and mortgage described in plaintiff's complaint herein having been on said 4th day of May, 1894, duly filed with the clerk of this court; and the plaintiff, Willis Thorp, and the complainant in intervention, John W. Irvin, having heretofore and on, to wit, June 3rd, 1895, entered into a stipulation, in which stipulation it is agreed that the plaintiff shall have judgement of foreclosure and sale of the premises mentioned and described in his said mortgage, and said stipulation having been duly filed with the clerk of this court thereafter
28 and on, to wit, June 4th, 1895; and—

The court having heard the proofs necessary to enable it to render judgement herein against the said defendants, The Takou Mining and Milling Company and Sylvester Farrell;

And the court having heretofore made its findings of fact and conclusions of law, and said findings of fact and conclusions of law having been duly filed with the clerk of this court; and—

It appearing from the proofs taken in this case and as found in the findings of fact and conclusions of law herein made and filed in this cause; and—

It appearing to the court that there is now due the plaintiff from the said defendant, The Takou Mining and Milling Company, for principal and interest upon the note and mortgage mentioned and set forth in the plaintiff's complaint herein—for principal the sum of ninety-eight thousand four hundred five and $\frac{91}{100}$ dollars ($98,405.91), together with interest on said principal sum, at eight per cent. per annum, from August 20th, 1889, now amounting to the sum of forty-four thousand five hundred eighty-four and $\frac{36}{100}$ dollars ($44,584.36), making an aggregate sum of both principal and interest now due of one hundred forty-two thousand nine hundred

ninety and $\frac{27}{100}$ dollars ($148,990.27), together with interest upon said sum of one hundred forty-two thousand nine hundred ninety-two and $\frac{27}{100}$ dollars ($142,990.27) from the date hereof at the rate of eight per cent. per annum:

Now, on this 7th day of June, A. D. 1895, this cause coming on to be heard upon motion of Messrs. Bostwick and Crews, attorneys for plaintiff, for judgement and decree of foreclosure and sale, and the court, being fully advised in the premises, now grants said motion.

Wherefore, by reason of the law and premises, it is hereby ordered, adjudged, and decreed by this court that the plaintiff have judgement against the defendant The Takou Mining and Milling Company for the sum of one hundred forty-two thousand nine hundred ninety and $\frac{27}{100}$ dollars ($142,990.27), principal and interest, together with costs and an attorney's fee of two hundred and fifty dollars ($250.00).

II.

It is hereby further ordered, adjudged, and decreed by the court that all and singular the mortgaged premises mentioned and described in plaintiff's complaint herein and hereinafter described, or so much thereof as may be sufficient to raise the amount due the plaintiff for principal, interest, and costs in the suit and expenses of sale, be sold at public auction by and under the direction of United States marshal for the district of Alaska, where said mortgaged premises are situated; that said sale be made at the front door of the court-house, in the town of Juneau, Alaska, near where said mortgaged premises are situated; that United States marshal for the district of Alaska give public notice of the time and place of such sale according to the course and practice of this court and the law relative to the sale of real estate under execution; that the plaintiff or any of the parties to this suit may become a purchaser at such sale, and that the said United States marshal for the district of Alaska, after the time allowed by law for redemption has expired, execute a deed to the purchaser or purchasers of the mortgaged premises on the said sale, provided the deposit hereinafter mentioned shall have first been made with the clerk of this court.

III.

It is hereby further ordered, adjudged, and decreed by the court that the United States marshal out of the proceeds of said sale retain his fees, disbursements, and commissions on said sale and pay the plaintiff or his attorneys out of the proceeds his costs in this suit, taxed at twenty-five and $\frac{55}{100}$ dollars ($25.55), and the sum of two hundred and fifty dollars ($250.00) allowed by the court as attorneys' fees of foreclosure, with interest thereon from this date at the rate of eight per cent. per annum, and that the balance remaining in the hands of said United States marshal after the payment of the fees, commissions, disbursements, costs of suit, and attorneys' fees hereinafter mentioned be by him paid to the plaintiff

or his attorneys, same to be applied in payment or so much thereof as said proceeds of sale will pay of this decree.

IV.

It is hereby further ordered, adjudged, and decreed by this court that the defendant The Takou Mining and Milling Company, a corporation, Sylvester Farrell, and the plaintiff in intervention, John W. Irvin, and each of them, and all persons claiming or to claim from or under them or either of them, and all persons having liens subsequent to said mortgage or their personal representatives, and all persons having any lien or claim by or under such subsequent judgement or decree and their heirs and personal representatives and all persons claiming under them, and all persons claiming to have acquired any estate or interest in said premises subsequent to the execution of said note and mortgage described in the plaintiff's complaint herein be forever barred and foreclosed of and from all equity of redemption and claim in, of, and to said mortgaged premises and every part and parcel thereof from and after the delivery of the said United States marshal's deed.

V.

It is hereby further ordered, adjudged, and decreed by this court that the purchaser or purchasers of said mortgaged premises at said sale be let into possession thereof, and that any of the parties to this action who may be in possession of said premises or any part thereof and any persons who since the commencement of this action *has* come into possession under them or either of them deliver possession thereof to the purchaser or purchasers on production of the United States marshal's deed for such premises or any part thereof.

VI.

It is hereby further ordered, adjudged, and decreed by this
31 court that if the moneys arising from the said sale shall be insufficient to pay the amount so found to be due the plaintiff, as above stated, with interest, costs, attorneys' fees, and expenses of sale, as aforesaid, the United States marshal for the District of Alaska specify the amount of such deficiency and balance due the plaintiff in his return of sale, and that on the coming in of said return a judgement of this court shall be docketted for such balance against the defendant The Takou Mining and Milling Company, and that said defendant, Takou Mining and Milling Company, who is solely liable for the payment of the debt secured by the said mortgage, pay to the said plaintiff the amount of such deficiency and judgement, with interest thereon, at the rate of eight per cent. per annum, from the date of said last-mentioned return and judgement, and that the plaintiff have execution therefor.

VII.

It is hereby further ordered, adjudged, and decreed by this court that upon the sale of said mortgaged premises the purchaser or purchasers at such sale shall, before the sale be confirmed by the court,

deposit with the clerk of this court the sum of fifteen hundred dollars ($1,500.00), said sum to be held by the clerk of this court until the amended supplemental complaint in intervention of John W. Irvin has been heard and his rights finally determined thereunder, and upon the hearing and final determination of the rights of said complainant in intervention, if his right shall be adjudged to be prior and superior to the plaintiff's said mortgage, or if upon the trial of said complaint in intervention said note and mortgage shall be declared to be void, then the amount of the claims of complainant in intervention, John W. Irvin, as claimed and set forth in his amended and supplemental complaint herein, together with interest and costs of suit, shall be paid to him forthwith by order of this court from the said sum of money so deposited, as aforesaid, with the clerk of this court; but if his claim shall be finally decreed
32 to be subsequent and inferior to the lien of plaintiff's mortgage herein and said note and mortgage decreed not to be void as to the intervenor, John W. Irvin, then and in that event the complainant in intervention, John W. Irvin, shall have no right or claim to said money so deposited, as aforesaid, and the same shall belong to and by order of this court be paid to the plaintiff herein.

That the final determination of the complaint in intervention of said John W. Irvin shall not in any manner affect the title of the mortgaged premises herein ordered to be sold, but shall only affect the money so to be deposited in court, as aforesaid.

The discription and particular boundaries of the property authorized to be sold under and by virtue of this decree, so far as the same can be ascertained from the mortgage referred to or from the complaint filed in this action, are as follows:

The "Relocated Pilz No. 2" Lode claim, recorded in Book I of Quartz Locations, on page 9, of the records of said Harris mining district; also the "Jewel" Lode claim, recorded in Book I of Quartz Locations, page —, of the records of said Harris mining district; also the "Grand Review" Lode claim, recorded in Book I of Quartz locations, on page 23, of the records of said Harris mining district; also the "Golden Fleece" Lode claim, recorded in Book I of Quartz Locations, on page 59, of the records of said Harris mining district; also the "Lotta" Lode claim, recorded in Book I of Quartz Locations, on page —, of the records of said Harris mining district; also the "Keystone" Lode claim, recorded in Book B of Records, on page 20, of the records of Harris mining district; also the Juneau Lode claim, recorded in said Book B of Records, on page 21, of said records of said Harris mining district; also the Crown Point Lode claim, recorded in said Book B of Records, on page 35, of said records of said Harris mining district; also the Gold Hill Lode claim, recorded in said Book B of Records, on page 36, of the records of said Harris mining district; also the Capital Lode claim, recorded in said
33 Book B of Records, on page 62, of said records of said Harris mining district; also the Takou Gold and Silver Lode claim, recorded in Book "A" of Records, on page- 56 and 118 respectively, of the records of said Harris mining district; also the Takou Union Lode claim, recorded in said Book "A" of Records, on page- 56 and

119 respectively, of the records of said Harris mining district, less ten feet in and to said Takou Union lode, owned by Selim E. Woodworth. For greater certainty of discription of said lode claims reference is hereby made to said records of said Harris mining district—

Together with all and singular the mill sites, flumes and water rights, dips, spurs and angles, and also all the metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant and appurtenant or therewith usually had or enjoyed, and also all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining, and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said party of the first part of, in, or to said premises and every part and parcel thereof, with the appurtenances.

Done in open court, at Juneau, Alaska, this 7th day of June, 1895.

WARREN TRUITT,
Judge of the District Court of the United States for the District of Alaska.

(Endorsed as follows:) Original, No. 393. In the district court of the United States for the district of Alaska. Willis Thorp, plaintiff, *vs.* The Takou Mining and Milling Co. *et al.*, defendants. Judgement and decree of foreclosure and sale. Filed Jan. 7, 1895. Charles D. Rogers, clerk. Bostwick & Crews, attorneys for plaintiff; office address, Juneau, Alaska. Copy of within judgement
34 received and due service of the same acknowledged this 6th day of June, 1895. John S. Bugbee, C. S. Blackett, attorneys for John W. Irvin.

XII.

That upon the said entry of said last-described paper said Thorp pretended and claimed that by virtue thereof and of the proceedings hereinbefore set out that he had obtained a good and valid decree of foreclosure against the Takou Mining and Milling Company and Sylvester Farrell, and by virtue thereof pretended that he was authorized and empowered to sell said mortgaged property to satisfy the amount due upon said mortgage, and did cause a pretended execution and order of sale to be issued by the clerk of said court, and did cause the same to be advertised for sale by said marshal, who pretended by virtue thereof to sell the same to satisfy the said sum due upon said mortgage.

XIII.

That on the 12th day of July, 1895, the said marshal, claiming to act under and pursuant to said pretended execution and order of sale, offered said mortgaged property for sale, and said Thorp offered and bid therefore the sum of seventy-five thousand dollars ($75,000.00), which said offer and bid said marshal accepted.

XIV.

That thereafter and on September 12, 1895, said Thorp filed with said clerk a paper, and at said date said Thorp caused said paper and the contents thereof to be entered and spread upon the records of said court, of which the following is a copy, viz:

In the District Court of the United States for the District of Alaska.

Willis Thorp, Plaintiff, vs. The Takou Mining and Milling Company and Sylvester Farrell, Defendants, and John W. Irvin, Plaintiff in Intervention.	No. 393.	Order Confirming Sale.

35 This cause coming on regularly to be heard upon motion of Bostwick and Crews, attorneys for the plaintiff, for an order confirming sale of real estate upon the return of Louis L. Williams, United States marshal for the district of Alaska, of his proceedings upon the real estate hereinafter described under an order of sale issued in the above-entitled cause heretofore and on, to wit, the 7th day of June, A. D. 1895; and the said Louis L. Williams, United States marshal for the district of Alaska, having made sale of said property on the 12th day of July, A. D. 1895, at two o'clock p. m. of that day, in front of the court-house, in the town of Juneau, district of Alaska; and the said Louis L. Williams, United States marshal for the district of Alaska, having made his return of sale of said real estate, and having filed the same with the clerk of the United States district court for the district of Alaska, at Sitka, Alaska, on the 15th day of July, A. D. 1895; and

It appearing to the satisfaction of the court that the said return of the said marshal was so made and filed by him with the clerk of said court at the time and day herein set forth; and

It further appearing that no objections have been made by the judgement debtors or by any of them or by any person or persons on their behalf to the said return, and that more than ten (10) days have elapsed since the making and filing of said return; and

That all of the proceedings had about and upon said sale have been in all respects regular and in accordance *to* the statute in such case made and provided; and

It further appearing to the satisfaction of the court that Louis L. Williams, United States marshal for the district of Alaska, did, on the 12th day of July, A. D. 1895, offer said property for sale in front of the court-house, in the town of Juneau, Alaska, at two o'clock p. m. of said day, and that the plaintiff in said action, Willis Thorp, was the highest and best bidder, and that the sum bid by the said Willis Thorp, plaintiff, was the highest and best sum bid for said property; and

36 The court being fully advised in the premises, it is now, on motion of said plaintiff, by his attorneys, Messers. Bostwick and Crews, by the court here and now—

Considered, ordered, adjudged, and decreed that the real estate upon said order of sale and said return of said marshal mentioned and described and herein mentioned and described as follows, to wit:

The "Relocated Pilz No. 2" Lode claim, recorded in Book I of Quartz Locations, on page 9, of the records of said Harris mining district; also the "Jewel" Lode claim, recorded in Book I of Quartz Locations, on page —, of the records of said Harris mining district; also the "Grand Review" Lode claim, recorded in Book I of Quartz Locations, on page 23, of the records of said Harris mining district; also the "Golden Fleece" Lode claim, recorded in Book I of Quartz Locations, on page 59, of the records of said Harris mining district; also the "Lotta" Lode claim, recorded in Book I of Quartz Locations, on page —, of the records of said Harris mining district; also the "Keystone" Lode claim, recorded in Book B of Records, on page 20, of the records of said Harris mining district; also the "Juneau" Lode claim, recorded in said Book B of Records, on page 21, of said records of said Harris mining district; also the "Crown Point" Lode claim, recorded in said Book B of Records, on page 35, of said records of said Harris mining district; also the "Gold Hill" Lode claim, recorded in said Book B of Records, on page 36, of the records of said Harris mining district; also the "Capital" Lode claim, recorded in said Book B of Records, on page 62, of said records of said Harris mining district; also the "Takou Gold and Silver" Lode claim, recorded in Book A of Records, on page 56 and 118 respectively, of the records of said Harris mining district; also the "Takou Union" Lode claim, recorded in said Book A of Records, on page 56 and 119 respectively, of the records of said Harris mining district, less ten feet in and to said Takou Union Lode claim, owned by Selim E. Woodworth. For greater certainty of discription of said
37 lode claim reference is hereby made to said records of said Harris mining district—

Together with all and singular the mill sites, flumes, and water rights, dips, spurs, and angles, and also all the metals, ores, gold and silver bearing quartz, rock, and earth therein, and all the rights, privileges, and franchises thereto incident, appendant, and appurtenant or therewith usually had and enjoyed; also all and singular the tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining and the rents, issues, and profits thereof, and also all the estate, right, title, interest, property, possession, claim, and demand whatsoever, as well in law as in equity, of the said defendant of, in, and to said premises and every part and parcel thereof—

Was by said Louis L. Williams, United States marshal for the district of Alaska, sold to Willis Thorp, plaintiff in this action, for the sum of seventy-five thousand dollars ($75,000.00), and—

That the return of said marshal thereof be, and the same is hereby, in all respects approved and confirmed, and—

That the said Willis Thorp is entitled to and may forthwith enter into possession and upon said property by him purchased, as afore-

said, and that he may receive any rent or rents from any tenent or tenents now lawfully in possession of the same.

That the said Willis Thorp is entitled to a deed of said premises from Louis L. Williams, United States marshal for the district of Alaska, after the expiration of the time allowed by law for the redemption of said premises.

Done in open court this 12th day of September, A. D. 1895.

WARREN TRUITT,
Judge of the U. S. District Court for the District of Alaska.

(Endorsed:) Original. No. 393. In the district court of the United States for the district of Alaska. Willis Thorp, plaintiff, *vs.* The Takou Mining and Milling Co. *et al.*, defendants. Order confirming sale. Filed Sept. 12, 1895. Charles D. Rogers. Bostwick & Crews, attorneys for the plaintiff; office address, Juneau, Alaska.

38

XV.

That immediately after said pretended sale said Thorp entered into possession of all said property, and shortly thereafter pretended to sell said property and surrendered the possession thereof to these defendants, who ever since have been and now are in the possession of all of said property, receiving the income and the profits therefrom.

XVI.

That on or about the fourth day of September, 1898, said Sylvester Farrell and wife and said Takou Mining and Milling Company sold and conveyed all of said property to this plaintiff, who now owns the same.

XVII.

That no suit was ever commenced in any court nor was any proceedings attempted to foreclose said mortgage other than the proceedings above described, and that the defendants have no interest in said property nor any claim thereto except as hereinbefore described.

XVIII.

That no jurisdiction was ever obtained by said or any court in any suit or proceeding to foreclose said mortgage or to bar or divest the interest of said Farrell or this plaintiff or said Takou Mining and Milling Company in said property.

XIX.

That while said Thorp and these defendants have been in possession of said property they have received in the profits and income therefrom a sum equal to the amount of said mortgage and the interest thereon, except the sum of $1,000, which sum only is now due thereon and which said sum this plaintiff now offers to pay.

39

XX.

That there was no district court of the United States for the district of Alaska at the time said proceedings were had, and plaintiff alleges that neither the complaint nor the affidavit for the order of publication of summons or subpœna nor the summons nor subpœna published nor the order of publication nor the proof of publication of summons nor the proof of deposit in the post-office of a summons or subpœna and complaint *are* in accordance with the statutory requirements of the laws of Oregon or of the district of Alaska or of the United States in force at the time of said proceedings, and that no valid summons or subpœna was ever issued or served, personally or otherwise, upon said Sylvester Farrell or upon said Takou Mining and Milling Company, nor was any valid judgement or decree ever rendered against them *or* in the matter or proceedings hereinbefore described.

Prayer.

The plaintiff therefore asks a decree against defendants:

1st. That said defendants be declared to be mortgagees in possession of said property.

2nd. That the defendants have been fully paid the amount of said mortgage and the interest thereon, except the sum of $1,000 which they and said Thorp received from the profits and income from said property while the same was in their possession, or, if not so paid, that an accounting be had to ascertain the amount.

3rd. That the defendants vacate said property and surrender the possession thereof to this plaintiff, and that the pretended decree of foreclosure be annulled and set aside.

4th. That plaintiff recover his costs and disbursements in this suit from defendants.

W. SCOTT BEEBEE,
Attorneys for Plaintiff.

40 STATE OF OREGON, } ss:
County of Multnomah, }

I, D. Marx, being first duly sworn, say that I am the plaintiff herein, and that the foregoing complaint is true, as I verily believe.

DAN. MARX.

Subscribed and sworn to before me this 19th day of October, 1898.

K. E. PARKER,
Notary Public for Oregon.

[NOTARIAL SEAL.]

STATE OF OREGON, } ss:
County of Multnomah, }

I, H. H. Holmes, clerk of the county court of the State of Oregon for the county of Multnomah, do hereby certify that said court is a court of record, and that K. E. Parker, whose signature is affixed to the foregoing certificate of acknowledgement, was at the time of signing the same, to wit, the 19 day of Oct., A. D. 1898, a notary

public in and for said county and State, duly authorized and empowered by law to take and certify acknowledgements and administer oaths; that I am well acquainted with the handwriting of the said K. E. Parker and believe his signature subscribed thereto to be genuine, and that full faith and credit are due to his official acts, and that the said instrument is executed and acknowledged according to the laws of the State of Oregon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 19 day of Oct., A. D. 1898.

[OFFICIAL SEAL.] H. H. HOLMES,
Clerk of County Court,
By W. G. STIMSON, *Deputy.*

[10-cent internal-revenue documental stamp.]

(Said complaint is endorsed as follows:) No. 784. In the district court for the district of Alaska. Dan. Marx *vs.* W. M. Ebner *et al.*, defendant-. Complaint. Filed Nov. 12, 1898. Albert D. Elliot, clerk. W. Scott Beebee, pl't'f's att'y.

41 And afterwards, on the 12th day of November, 1898, the following further proceedings were had, which are in the words & figures following, to wit:

In the District Court for the District of Alaska.

D. MARX, Plaintiff,
vs.
THE EBNER GOLD MINING COMPANY and W. M. EBNER, Defendants.

The President of the United States of America to the Ebner Gold Mining Company and W. M. Ebner, Greeting:

You are hereby commanded that you appear before district court for the district of Alaska within twenty days from the date of the service of this subpœna upon you to answer the bill of complaint exhibited against you in said court by D. Marx, the above-named complainant, and to further receive whatever the said court shall consider in that behalf, and this you are — to omit under the penalty of two hundred and fifty dollars.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of this court, this 12 day of November, 1898.

[CLERK'S SEAL.] ALBERT D. ELLIOT, *Clerk.*

[10-cent revenue stamp.]

W. SCOTT BEEBEE,
Solicitor for Complainant.

MEMORANDUM.—The defendant- *is* to enter *his* appearance in the suit above mentioned in the clerk's office at Sitka, Alaska, on or be-

fore the date at which the above subpœna is returnable; otherwise the bill will be taken *pro confesso*.

W. SCOTT BEEBEE,
Solicitor for Complainant.

(Endorsed:) No. 784. In the district court for the district of Alaska. D. Marx, plaintiff, *vs.* The Ebner Gold Mining Company and W. M. Ebner, defendants. Subpœna. Returned and filed Nov. 12, 1898. Albert D. Elliot, clerk. W. Scott Beebee, solicitor for complainant.

42 (Said subpœna is further endorsed as follows:) In United States dist. court, dist. of Alaska. I hereby certify that I received the within subpœna on 12th day — November, 1898, and served the same by delivering to W. M. Ebner a true copy, together with a true and correct copy of complaint, in Juneau, Alaska, Nov. 12th, 1898. James M. Shoup, U. S. marshal, by W. S. Staley, deputy.

43 And afterwards the following further proceedings were had on the 15 day of November, 1898, & are in words & figures following, to wit:

In the United States Court for the District of Alaska.

D. MARX, Plaintiff,
vs.
THE EBNER GOLD MINING COMPANY and WM. M. EBNER, Defendants. } No. —. Motion.

Comes now the above-named defendants, by and through their attorney, W. E. Crews, and, making a special appearance for the sole and only purpose of this motion, moves this honorable court to quash the summons and to strike the complaint from the files in this cause, for the reason that said complaint and summons are not entitled in any court known to the laws or practice in the district of Alaska, and for the further reason that said summons cites the defendants to appear in the district court for the district of Alaska, and that there is no such court in said district recognized by the laws or the practice thereof.

W. E. CREWS,
Attorney for Defendants.

Due and legal service of the within motion is hereby admitted.

W. S. BEEBEE,
Att'y for Pl't'f.

(Endorsed:) No. 784. U. S. district court Alaska. D. Marks *vs.* Ebner Gold Mining Co. and Wm. M. Ebner. Motion. Filed Nov. 15, 1898. Albert D. Elliot, clerk. W. E. Crews, attorney for defendants.

44 And afterwards, to wit, on November 15 & November 23, 1898, the following further proceedings were — and appear of record in said cause:

(The following journal entries appear under the respective dates given.)

D. MARKS, Pl'ff,
vs.
THE EBNER GOLD MINING COMPANY & WM. M. Ebner, Def'ts. } (Nov. 15th, 1898.) No. 784.

Now, at this day, this cause coming on to be heard upon the motion of defendants to quash the summons and to strike the complaint from the files in this cause, W. E. Crews, Esq., appearing especially for said purpose in support of said motion, and W. Scott Beebee appearing as attorney for the plaintiff, in opposition thereto, and being argued by counsel, and the court, being fully advised in the premises, sustains said motion and plaintiff is allowed to amend said pleadings by interlineation and file instanter.

D. MARX, Plaintiff,
vs.
THE EBNER GOLD MINING COMPANY and W. M. Ebner. } (Nov. 23, 1898.) No. 784. Order Taking under Advisement.

Now, at this day, the demurrer of the above-named defendants to the plaintiff's bill of complaint filed herein coming on to be heard, the defendants appearing by W. E. Crews, Esq., their attorney, for said demurrer, and the plaintiff appearing by W. Scott Beebee, Esq., his attorney, in opposition thereto, & being argued by counsel, & the court, not being sufficiently advised, takes the same under advisement, & parties are each given twenty days to file briefs herein.

45 And afterwards, to wit, on the 23 day of November, 1898, the further following proceedings were had & appear of record, to wit:

In the United States District Court for the District of Alaska.

D. MARX, Plaintiff,
vs.
THE EBNER GOLD MINING COMPANY and William M. Ebner, Defendants. } No. —. Demurrer.

The demurrer of the above-named defendants, The Ebner Gold Mining Company and William M. Ebner, to the bill of complaint of the above-named plaintiff.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint contained to be true in such manner and form as the same are set forth, doth demur to the said bill, and for cause of demurrer sayeth:

I.

That said bill does not state facts sufficient to constitute a cause of suit against these defendants.

II.

That it appears by the plaintiff's own showing by the said bill of complaint that he is not entitled to the relief prayed for by the bill against the defendants.

III.

That there are no direct and positive allegations of fact alleged or set forth in said bill upon which a decree in accordance with the prayer thereof might or could be based.

IV.

That it is shown by said bill that the relief sought is based upon mere conclusions of law and not on fact.

Wherefor-, and for divers other good causes of demurrer appearing on said bill, these defendants do demur thereto, and they pray the judgement of this honorable court whether they shall be com-
46 pelled to make answer to the said bill, and they humbly pray to be dismissed hence with reasonable costs in their behalf sustained.

W. E. CREWS,
Solicitor and Counselor for the Defendants,
The Ebner Gold Mining Co. and Wm. M. Ebner.

UNITED STATES OF AMERICA, } ss:
District of Alaska, }

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

W. E. CREWS,
Counsel for Defendants.

UNITED STATES OF AMERICA, } ss:
District of Alaska, }

William M. Ebner, being first duly sworn, deposes and says that he is one of the defendants above named, and that the foregoing demurrer is not interposed for delay.

WM. M. EBNER.

Subscribed and sworn to before me this 22 day of November, 1898, notary public for Alaska.

C. S. BLACKETT,
Notary Public.

Due and legal service of the within demurrer is hereby accepted.

W. S. BEEBEE,
Att'y for Pl'ff.

(Endorsed:) No. 784. U. S. district court, Alaska. D. Marx *vs.* Ebner Gold Mining Co. and Wm. M. Ebner. Demurrer. Filed Nov. 23, 1898. Albert D. Elliot, clerk. W. E. Crews, attorney for defendants.

47 And afterwards, to wit, on the 6th day of January, 1899, the following further proceedings were had and appear of record, to wit:

In the United States District Court for the District of Alaska.

D. MARX, Plaintiff,
vs.
WM. M. EBNER and THE EBNER GOLD MINING COMPANY, Defendants. } Order.

Now, on this day, this cause coming on to be heard upon the demurrer of the defendants, William M. Ebner and The Ebner Gold Mining Company, a corporation, to the bill of complaint of the plaintiff, and after hearing the arguments of counsel for the defendant- and for the plaintiff and an examination of the authorities in support of the contentions, and the court being otherwise fully advised in the premises—

It is ordered, adjudged, and decreed that said demurrer be, and the same is, in all respects fully sustained, and the counsel for the plaintiff having stated in open court that he did not desire to plead further, but intended to stand upon the bill as it now is—

It is further ordered and adjudged that said bill of complaint be, and the same is hereby, dismissed.

It is further adjudged, upon the stipulation of counsel in open court, that the amount in controversy herein and that said property involved and discribed in said bill of complaint exceeds in value the sum of five thousand dollars ($5,000.00).

Done in open court this 6th day of January, 1899.

CHARLES S. JOHNSON, *Judge.*

(Endorsed:) No. 784. In the district court of the United States for the district of Alaska. D. Marx, plaintiff, *vs.* Wm. M. Ebner and The Ebner Gold Mining Co., defendant-. Order. Filed Jan. 6, 1899. Albert D. Elliot, clerk. W. E. Crews, attorney for defendants; office, Juneau, Alaska.

48 And afterwards, to wit, on the 23 day of May, 1899, the following further proceedings were had & appear of record in this cause, to wit:

In the District Court of the United States in and for the District of Alaska.

D. MARX, Plaintiff,
vs.
WM. M. EBNER and THE EBNER GOLD MINING COMPANY, Defendants.

Assignment of Errors.

Now comes the above-named plaintiff, D. Marx, and files this his assignment of errors, which he will urge upon the appeal of this cause in the Supreme Court of the United States, viz:

I.

The court erred in deciding that plaintiff was not entitled to a decree in his favor upon the case-made in his complaint.

II.

The court erred in deciding that the court obtained jurisdiction to render a decree in the case of Willis Thorp *vs.* Sylvester Farrell and The Takou Milling and Mining Company, the record — which is disclosed and contained in plaintiff's complaint.

III.

The court erred in sustaining the defendants' demurrer to plaintiff's complaint.

IV.

The court erred in deciding that the plaintiff's complaint should be dismissed and in dismissing the same.

V.

The court erred in deciding that it appeared from the affidavit for the order of publication or the record in said case that
49 personal service of process on defendants was not practicable, and that personal service of summons or subpœna could not be made upon defendants or their officers, agents, or clerks within the district of Alaska, or that due diligence was exercised to find and serve defendants within said district of Alaska.

VI.

The court erred in deciding that the summons or subpœna attempted to be served in said cause and not the order of the court was the process or notice required by law to obtain jurisdiction to render the decree therein.

VII.

The court erred in deciding that the publication of the subpœna or summons published in said cause conferred jurisdiction upon the court to render a decree therein.

VIII.

The court erred in deciding that the proof of service or of deposit in the post-office was sufficient to confer jurisdiction in said case.

IX.

The court erred in deciding that the general laws of Oregon instead of the laws of the United States and the rules of the Supreme Court of the United States *was* the proper pro*proce*dure to confer jurisdiction in said case.

X.

The court erred in deciding that it was not necessary to publish an order of the court in said case, as required by the practice in the United States circuit and district courts.

XI.

The court erred in deciding that the affidavit or showing for the order of publication or the order of publication or the subpœna or summons attempted to be served or published in said case or the proof of service or deposit in the post-office was sufficient to
50 confer jurisdiction upon the court in said cause of Willis Thorp *vs.* Sylvester Farrell and The Takou Milling and Mining Company.

Wherefore the said plaintiff prays that because of said errors that the same may be considered by the Supreme Court of the United States, and that a decision may be there made granting plaintiff the relief prayed for in his complaint, and that the decision and decree of this court may be reversed.

W. SCOTT BEEBEE.
Attorney for Plaintiff.

(Endorsed:) No. 784. In the district court of the United States for the district of Alaska. D. Marx, plaintiff, *vs.* Wm. M. Ebner and The Ebner Gold Mining Company, defendants. Assignment of errors. Filed May 23, 1899. Albert D. Elliot, clerk. W. Scott Beebee, attorney for plaintiff.

51 And afterwards, to wit, on the 24 day of May, 1899, the following further proceedings were had and appear of record in this cause:

In the District Court of the United States for the District of Alaska.

D. MARX, Plaintiff,
vs.
WM. M. EBNER and THE EBNER GOLD MINING COMPANY, Defendants.

Now, on this the 24 day of May, 1899, comes the above-named plaintiff, by W. S. Beebee, his attorney, and moves the court for an order and allowance of an appeal in this cause to the Supreme Court of the United States, and the court being now advised—

It is ordered that said appeal be, and the same is now, allowed as prayed for.

CHARLES S. JOHNSON,
District Judge, District of Alaska.

(Endorsed:) No. 784. In U. S. dist. court for Alaska. D. Marx, pl't'f, *vs.* Wm. M. Ebner *et al.*, def'ts. Order of appeal. Filed May 24, 1899. Albert D. Elliot, clerk. W. S. Beebee, att'y for pl't'f.

52 And afterwards, on the 24 day of May, 1899, the following further proceedings were had & appear of record in said cause:

(MAY 24TH, 1899.)

D. MARX
vs.
THE EBNER GOLD MINING COMPANY & W. M. EBNER. } No. 784.

Order Allowing Appearance.

On motion of Robert A. Friedrich, Esq., it is ordered by the court that he be entered of record as associate counsel for defendant- in the above-entitled cause.

53 And afterwards, to wit, on the 24 day of May, 1899, the further following proceedings were had & appear of record, to wit:

D. MARX, Plaintiff,
vs.
WM. M. EBNER and THE EBNER GOLD MINING COMPANY, Defendant-.

On motion of W. S. Beebee, attorney for the plaintiff, heard upon a petition filed herein, it is ordered that the appeal prayed for be, and the same is, allowed, and it is further ordered that the time for filing the transcript and record on appeal with the clerk of the supreme court be, and the said time is, extended sixty days, making in all four months from the date of the citation. It is further ordered that the bond on appeal be in the sum of two hundred and fifty dollars, to be approved by the court.

CHARLES S. JOHNSON,
District Judge.

(Endorsed:) No. 784. D. Marx, pl't'f, *vs.* Wm. M. Ebner *et al.*, def'ts. Order. Order granting petition on motion. Filed May 24, 1899. Albert D. Elliot, clerk. W. S. Beebee, att'y for pl't'f.

54 And afterwards, to wit, on the 9th day of June, 1899, the following further proceedings were had & appear of record in this cause, to wit:

In the District Court of the United States for the District of Alaska.

D. MARX, Plaintiff,
vs.
WM. M. EBNER and THE EBNER GOLD MINING COMPANY, Defendants.

Know all men by these presents that we, Dan. Marx, of Portland, Oregon, plaintiff and appellant, and Ben. Selling, of ——, are held and firmly bound unto William M. Ebner and the Ebner Gold Mining Company in the sum of two hundred and fifty dollars ($250.00), to be paid to the same William M. Ebner and the said Ebner Gold Mining Company; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 29 day of May, A. D. 1899.

Whereas the above-named Dan. Marx has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the judge of the district court of the United States for the district of Alaska:

Now, therefor-, the condition of this obligation is such that if the above-named Dan. Marx shall prosecute said appeal to effect and answer all damages and costs if he fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

DAN. MARX.
BEN. SELLING.

Sealed and delivered, taken and acknowledged this 29 day of May, 1899, before me.

[NOTARIAL SEAL.]

A. P. TIFT,
Notary Public for Oregon.

The above bond on appeal approved by me this 29 day of May, 1899.

55

CHARLES B. BELLINGER,
District Judge for the District of Oregon.

The above bond taken and approved by me this the 9th day of June, 1899.

CHARLES S. JOHNSON,
District Judge for Alaska.

(Endorsed:) No. 784. In U. S. dist. court for dist. of Alaska. D. Marx, pl'ff, *vs.* Wm. Ebner *et al.*, def'ts. Cost bond. Filed Jun 9, 1899. Albert D. Elliot, clerk.

56 And afterwards, to wit, on the 23 day of June, 1899, the following further proceedings were had & appear of record in said cause, to wit:

In the United States District Court for the District of Alaska.

D. MARX, Plaintiff,
vs.
WM. M. EBNER and THE EBNER GOLD MINING COMPANY, Defendants.

To William M. Ebner and The Ebner Gold Mining Company:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the 2d Monday of October, 1899, pursuant to an appeal filed in the clerk's office of the United States district court for the district of Alaska, wherein D. Marx is appellant and you, William M. Ebner and The Ebner Gold Mining Company, are respondents, to show cause, if any there be, why the judgement in the said appeal mentioned should not be corrected and reversed and speedy justice should be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States Supreme Court, this the 23rd day of June, A. D. 1899.

CHARLES S. JOHNSON,
District Judge.

Due personal service of a copy of the foregoing citation is hereby admitted and acknowledged to have been made on me at Juneau, Alaska, on the 23 day of June, 1899.

W. E. CREWS,
Attorney for Defendants and Respondents.

(Endorsed:) No. 784. In U. S. dist. court, district of Alaska. D. Marx, pl'ff, *vs.* Wm. Ebner *et al.*, def'ts. Citation. Filed June 23, 1899. Albert D. Elliot, clerk.

57 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, *District of Alaska*, } ss:

I, Albert D. Elliot, clerk of the district court of the United States of America for the district of Alaska, do hereby certify that the foregoing pages, numbered from one to 57, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of D. Marx, plaintiff, *vs.* The Ebner Gold Mining Company and W. M. Ebner, defendants, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed, at the town of Sitka, in said district, the 17th day of July, A. D. 1899.

[Seal United States District Court, Alaska.]

ALBERT D. ELLIOT, *Clerk*,
By JOSEPH J. ROGERS, *Deputy*.

58 In the United States District Court for the District of Alaska.

D. MARX, Plaintiff,
vs.
WM. M. EBNER and THE EBNER GOLD MINING COMPANY, Defendants.

To William M. Ebner and the Ebner Gold Mining Company:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at Washington, D. C., on the 2d Monday of October, 1899, pursuant to an appeal filed in the clerk's office of the United States district court for the district of Alaska, wherein D. Marx is appellant and you, William M. Ebner and The Ebner Gold Mining Company, are respondents, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and reversed and speedy justice should be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States Supreme Court, this the 23rd day of June, A. D. 1899.

CHARLES S. JOHNSON,
District Judge.

Due personal service of a copy of the foregoing citation is hereby admitted and acknowledged to have been made on me at Juneau, Alaska, on the 23 day of June, 1899.

W. E. CREWS,
Attorney for Defendants and Respondents.

[Endorsed:] No. 784. In U. S. dist. court, district of Alaska. D. Marx, pl'ff, *vs.* Wm. Ebner *et al.* al., def't's. Citation. Filed Jun 23, 1899. Albert D. Elliot, clerk.

Endorsed on cover: File No., 17,499. Alaska D. C. U. S. Term No., 126. D. Marx, appellant, *vs.* William M. Ebner and The Ebner Gold Mining Company. Filed August 26th, 1899.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

DAN MARX,
Appellant,

vs.

WM. M. EBNER, *et al*,
Appellees.

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS.

On August 20th, 1889, the Takou Mining and Milling Company owned thirteen mining claims at Juneau, Alaska, and on that day mortgaged the same to Samuel Coulter for $98,405.91. Eight of said claims were subsequently sold to Sylvester Farrell. Coulter sold and assigned said mortgage to Willis Thorp, who attempted to foreclose the same by publication, and who afterwards delivered to the respondents, a deed which purported to convey all of said property to the respondents. Farrel and The Takou Mining and Milling Company conveyed all of said thirteen mining claims

to this appellant. The appellant commenced this suit to redeem from said mortgage, and directly attacks the foreclosure proceedings, and for the purpose of exposing its invalidity, a complete copy of the record is incorporated in appellant's bill of complaint. Respondents' demurrer to the bill was sustained, and the bill dismissed, whereupon the appellant brings this appeal. Therefore if said foreclosure proceedings operated to pass the title to said property, the decree should be affirmed, otherwise the decree should be reversed. Appellant claims that the foreclosure proceedings and the decree therein, are void, and the objections to said record will be presented here in the order they appear therein.

ARGUMENT.

Section 7 of the Act of May 14, 1884, establishing a civil government for Alaska, provides that the general laws of Oregon then in force, should be the laws for said district, and in the brief it will be assumed that the procedure provided by the Oregon statutes operated in Alaska. The foreclosure was by publication, and the defendants therein were not personally served with process, and never appeared in said suit.

I.

The act of May 14th, 1884, created and established

the District Court for the District of Alaska, and defined its jurisdiction. All the record of the foreclosure proceedings purports to be in "The District Court of the United States for the District of Alaska." That the District Court, is not a Court of the United States, is conclusively settled by the decisions of this Court.

McAllister vs. United States, 11 S. C. R., 949.

The Coquitlan vs. United States, 16 S. C. R., 1114.

Section 50, of the Oregon Statute provides that the actions shall be commenced by "filing a complaint" * * * * and Section 64 provides that the complaint shall contain the "name of the Court," and the appellant contends that the jurisdiction of the District Court for the District of Alaska is not invoked by the application addressed to the District Court of the United States for the District of Alaska.

Ward vs. Stingham, 1 Code Rep., 118.

Garretson vs. Hayes, 7 Iowa, 19.

Jordan vs. Brown, 71 Iowa, 421.

The fact that the Court has jurisdiction of a class of causes does not of itself authorize the Court to proceed to a decree in any given case, but the machinery of the law must be put in motion, and this is only done in the manner provided by statute, viz., by filing a complaint

stating "the name of the Court," and other essentials not necessary to be here enumerated.

The power and authority of the District Court was not invoked, or the exercise of its authority induced, by a plea to a United States Court. A pleading addressed to one Court, does not influence or start the machinery of any other Court.

"Before the power to hear and determine a cause "attaches the parties must be brought before the tri- "bunal by proper pleadings, according to the practice "and laws governing proceedings therein."

Jordan vs. Brown, 71 Iowa, 421.

Dunlap vs. Susterlin, 63 Texas, 38.

Sheldon vs. Newton, 3 Ohio St., 499.

Edmunston vs. Elmerston, 2 Ohio, 252.

United States vs. Arrendondo, 6 Pet., 709.

The Court, in the recent case of Stockton vs. Reynolds, 140 U. S., 264, has practically adopted the principle contended for here. In this case the Court held that the judgment must be consistent with, and responsive to the pleadings, and by way of illustration held that if the pleading warranted or prayed for one kind of judgment that the entry of an entirely different judgment and one

without the issues was void. And it seems to follow that it is as necessary to describe the Court as the cause of action.

Certainly a complaint filed in the Circuit Court of the United States, for the District of Oregon, but entitled in the Circuit Court of the United States for the District of California, would not sustain a judgment by default in the Oregon Court, in case where there was no personal service of process or appearance by defendants, but after defendants are personally before the Court, either by personal service or appearance, the Court, having full jurisdiction could make the proper amendment, could treat the erroneous and descriptive words as surplusage; but in a case like this the record must stand as it is made and published, and inasmuch as it fails to show affirmatively a strict compliance with the requirements of the statute, it is void.

Gulpin vs. Page, 18 Wal., 350.

II.

Section 54 of the Oregon Statute provides the manner in which personal service shall be made upon a defendant, and Section 53 declares that the sheriff shall return to the Court, whether personal service was made or the defendant not found, then Section 55 provides that "when service of the summons cannot be made as

"prescribed in the last preceding section, (Section 54), "and the defendant after due diligence cannot be found "within the state, and when that fact appears by affi- "davit the judge shall grant an order that the service "be made by publication of a summons."

Under this section and before publication can be ordered, it must appear that the defendant cannot be personally served, and also that he cannot after due diligence be found within the state, and that fact, viz., the fact constituting "due diligence" must appear by affidavit. The affidavit upon which the order and publication were made, states no fact whatever tending to show that the defendant Farrell could not with "due diligence" have been found within said district. It merely states that he is a resident of Portland, Oregon, and that is his postoffice address. This is a mere allegation of non-residence in Alaska, and a residence in Oregon. Under statutes like this the Courts hold with out any dissent, that an effort amounting to "due diligence" must be made to find the defendant, and that the facts constituting this due diligence must appear in the affidavit, and affirmatively in the record.

The Supreme Court of California, in Ricketson vs. Richardson, 26 Cal., 153, says that "An affidavit which "merely repeats the language or substance of the stat- "ute is not sufficient. * * * * The ultimate facts of the "statute must be proved by the affidavit, by showing

"the probatory facts upon which each ultimate fact "depends. These ultimate facts, are conclusions drawn "from the existence of other facts to disclose which is "the special office of the affidavit. To illustrate: It is "not sufficient to state generally that after due dili- "gence the defendant cannot be found within the state, "or that the plaintiff has a good cause of action against "him, or that he is a necessary party; but the facts con- "stituting due diligence, or the facts showing that he is "a necessary party should be stated. To hold that a "bald repetition of the statute is sufficient, is to strip "the Court or Judge to whom the application is made "of all judicial functions, and allow the party himself "to determine in his own way the existence of jurisdic- "tional facts—a practice too dangerous to the rights of "defendants to admit of judicial toleration. The ulti- "mate facts stated in the statute, are to be found, so to "speak, by the Court or Judge from the probatory "facts stated in the affidavit before the order for pub- "lication can be legally made."

In McCracken vs. Flanigan, 127 N.Y., 493, the Court says: "It is from an examination of this statute, pretty "evident, that some degree of diligence must be exer- "cised to find the party, and what is due diligence de- "pends upon circumstances surrounding each case, and "the simple averments in the affadavit, that the defen- "dant is a non-resident and cannot be found within the "state are not alone sufficient to support an order for "the service of a summons by publication. * * * * It "need no argument to show that the averment in the "affidavit that the defendant cannot be found in the "state does not tend to prove the exercise of due dili- "gence to find defendant, for the statute in question

"not only requires that it be stated in the affidavit that "the defendant cannot be found, but expressly requires "the averment that he cannot be found after due dili- "gence. Hence the statute forbids that due diligence "may be implied from the statement that the defendant "cannot be found within the state."

In Pike vs. Kennedy, 15 Oregon, 425-6, an affidavit for an order of publication was held sufficient which averred:

"That said defendants reside at Walla Walla, in the "Territory of Washington, which is their postoffice ad- "dress; * * * that personal service cannot be had upon "defendants or either of them, for the reason that said "defendants have departed from this state, and remain- "ed absent therefrom for more than six consecutive "weeks, and now reside at Walla Walla."

Concerning this affidavit the Court says:—

"As we have seen, non-residence is not of itself suffi- "cient to authorize the order of publication, because "that alone is not inconsistent with the idea that the "defendant may be in the state doing business, al- "though his residence is in another state, and hence "would not relieve the necessity or requirement of due "diligence. But the allegation of non-residence in con- "nection with the facts additionally alleged * * * would "be ground for claiming that due diligence would be "unavailing. The allegation of non-residence is spe- "cific and certain in the affidavit, 'the defendants reside at "Walla Walla, Washington Territory, and that is their "postoffice address,' but this is not enough, and the in-

"quiry now is, whether the further statement taken in "connection with the averment of non-residence, 'that "personal service cannot be made on the defendants for "the reason that they have departed from the state, and "have remained absent therefrom for more than six "consecutive weeks, and now reside at Walla Walla,' "show such a state of facts as renders it apparent that "no act of diligence would be of any avail to find them "in the state.

"It seems to me that these averments, taken to-"gether, are legal evidence tending to show at least not "only non-residence, but actual absence from the state, "at the time this affidavit was made."

The same doctrine is announced in—

McDonald vs. Cooper, 32 Fed., 748.

Palmer vs. McMaster, 33 Pac., 132.

Beach vs. Beach, 43 N. W., 702.

The return of the marshall shows that the summons was received by him December 22, 1893, and was returned January 2, 1894.

It thus appears that he had the summons in his hands eleven days only, and we submit that it was impossible that he could have made any search or inquiry about the defendants, except in the immediate vicinity of Juneau, for the place was isolated, and the only way of communicating with other points was by boats, only

two per month touching at that point during that month; it is therefore preposterous to pretend that any search or inquiry was made by the officers beyond the limits of Juneau.

The marshal could not during the whole year of 1894, have discovered whether the defendants could be found in Alaska, and further, according to the authorities cited here, the return of this officer is not a sufficicient showing of diligence upon which to base an order of publication.

It is not sufficient basis for an order of publication for an officer to merely return that he had made diligent search, or for the party making the affidavit to state that he had exercised due diligence to find the defendants. It is necessary for him to return and show what he did, what efforts were made to find and serve the defendants.

It is their province to state the facts, and not to decide whether they have been diligent, or whether their acts constitute "due diligence." Their duty is to state the probative facts, and when the question is presented the Court will decide the ultimate fact, if there is any legal evidence upon which the judicial mind can act.

All that is averred in the affidavit regarding the effort made to find and serve the defendant Farrell is:—

"That the defendant, Sylvester Farrell, is not a res-"ident of the district of Alaska, but resides in the city "of Portland, Oregon. * * * That the postoffice address "of the said Sylvester Farrell is Portland, Oregon, where "said Farrell resides. * * * That a summons was duly "issued out of this court to the United States Marshal "for the District of Alaska, with directions to said U. S. "Marshal to serve the same upon said defendants, and "the said U. S. Marshal has returned the same to the "clerk of this Court with his return endorsed thereon "to the effect that the said defendants or either of them "could not be found in his district.

"Personal service of said summons cannot be made "on the said defendant, and the plaintiff therefore de-"mands an order that service of the same be made by "publication."

There is here no averment that the defendant was not in Alaska at the date of the affidavit, or that he was actually present at any place outside said district, or that any diligence was exercised to locate him. It is merely an averment that "he resides in Portland, Ore." That might be true, yet he could be in Alaska on pleasure or business. The statement that the marshal could not find the defendant, and so returned to the Court, does not help the affidavit. The search and return by the marshal is directed under the prior section, and does not establish the due diligence required by Section 55, that when it appears that the marshal cannot find the defendants, and when it appears by the affi-

davit that defendants cannot after due diligence be found, then, and not till then, can the order be made.

III. 1 Pac Rep 833

The summons published required the defendants to appear in a Court that did not exist. In Smith vs. Ellendale Mill Co., 4 Oregon, 41, the Court says: "A "judgment for want of an answer can only be 'taken "when it appears that the defendant has been duly serv- "ed with a summons notifying him to appear and an- "swer in the Court where the judgment is sought to be "taken.' " This doctrine is approved in:—

Trullinger vs. Todd, 5 Oregon, 39.

Sullivan vs. Settlemeier, 74 U.S., 444.

If a summons is void because it requires a defendant to appear in a wrongly named Court, it must be void, if it notifies a defendant to appear in a Court that has no existence. The publication of this summons imposed no obligation to appear; and the defendants were not in default in consequence thereof.

IV.

This summons is also void because it does not state the date of the order of publication. This is a requirement of Section 55, and its non-observance is fatal to the jurisdiction of the Court; concerning this quesion

the jurisdiction of the Court; concerning this question the Supreme Court, in March, 1889, in O'Dell vs. Campbell, 9 Oregon, 304-5, employed this language:

"The next objection is that the summons published "does not contain the date of the order for service by "publication. Section 55 of the code of procedure pro- "vides, among other things, that the summons published "shall contain the name of the court, the title of the "cause, a succinct statement of the relief demanded, the "date of the order for service by publication, and the "time within which the defendant is required to answer "the complaint.

"The summons published in this case contains all of "the several matters except the date of the order for "service by publication. Where the statute prescribes "certain things, which the summons published shall con- "tain, they must be deemed essential and necessary and "the absence of any of them in the summons published "is not a compliance with its requirements, nor do we "think that this provision of the statute is merely direc- "tory as claimed, but mandatory; for if the summons "may omit the date of the order for service by publica- "tion and still be held sufficient, why not, with equal "reason the succinct statement of relief demanded, or "the name of the Court, and the title of the cause, or "any other matter which this provision requires the "summons shall contain? In the eye of the law, one is "as essential as the other, and none can be omitted with- "out vitiating the summons published. It seems to "us no one would claim that a summons which omitted "to state these matters required by the statutes could "be held valid. The summons is the process by which

"the Court acquires its jurisdiction over the person, "and certainly if there is any legal proceeding in which "a direct and literal complianace with the statute ought "to be exacted, it is in a proceeding of the character "under consideration; the summons published must "contain the date of the order, not some other date, be- "fore or after the order was made by the judge, but the "date of the order itself. The summons published does "not contain the date of the order for service by publi- "cation, and is not the summons which the law pre- "scribes. We think the objection well taken. It is "sufficient that the law has prescribed the several mat- "ters which the summons shall contain, and whether "deemed needful or not, we have no authority to disre- "gard its requirements."

This summons does not contain any date, much less the date of the order. The summons states "Order for publication made January 5th, 1894." The only reference to a date in the order is this statement. "Dated January —, 1894." The order therefore is not dated, but left blank, and the summons, while stating when the order was "made," does not pretend to give the date, and it could not, for the order contained no date.

The affidavit for the order was sworn to January 3rd, 1894. The order itself was filed January 5th, 1894. The date of the order could therefore be credited to January 3rd, 4th or 5th. Probably the order was signed by the judge when the affidavit was made, January 3rd, and thereafter all the papers were left with the clerk for

filing. But the law contemplates that the order should be dated as well as signed, otherwise the provision would not have been made, that the summons should "contain the date" of the order, and the statute is not satisfied by a statement that the order was "made" on a particular day, when the law required the date to be stated, one expression is not the equivalent of the other.

The statute does not provide that the summons shall specify when the order was "made" but when it was dated.

To make an order is one thing, and to date it is a very different thing; it requires a different act for each service.

V.

The paper designated a summons in the record purports to have been and was issued by the clerk of the court, and corresponds essentially with the subpœna issued by the clerk of a Federal Court. It runs in the name of the President of the United States, and is tested in the name of the Judge of the District Court, and is signed and dated by the Clerk of the Court, under his seal, and therefore is not a statutory summons.

It also has the name of the plaintiff's attorney written on the corner and by the Clerk.

The appellant in his bill alleged that the clerk issued and delivered this paper to the marshal, and it further alleged that it was never legally issued or served.

All this the demurrer admits, and it necessarily follows that if there was no valid summons or subpœna ever issued or served, that the decree is inoperative. But, independent of the admission made by the demurrer, it is certain that under the Oregon statutes the summons is issued by either the plaintiff or his attorney, and not by the clerk.

1 Oregon Code, Sec. 51.

White vs. Johnson, 27 Oregon, 267.

VI.

The summons requires the defendants to appear as follows:—"You are hereby commanded to be and ap-"pear in the above entitled Court, holden at Sitka, in "said district, and answer the complaint filed against "you in the above entitled action, within twenty days "from the date of the service of the summons upon you, to-wit:—

"Within twenty days from the 5th day of March, "1894, and if you fail so to appear and answer, for want "thereof the plaintiff will apply to the Court for the re-

"lief demanded in the said complaint," and was dated January 5th, 1894. The order directed that it be published once a week for at least eight weeks.

The affidavit of the publisher shows that it was published once a week for nine consecutive weeks, from January 13th, 1894, to March 17th, 1894. On May 4th, 1894, a default was entered against defendants at Sitka.

Section 3 of the act creating the District of Alaska provides that there should be two terms of Court each year, one at Sitka, commencing on the first Monday of May, and one at Wrangel, commencing on the first Monday of November.

Section 55 of the Oregon code provides that the summons published shall state "the time within which the defendant is required to appear and answer the complaint," and Section 56 provides that "the defendant shall appear and answer by the first day of the term following the expiration of the time (eight weeks), prescribed in the order for publication."

The law appointed the term of court, and the law provided that a defendant should have until the first day of the term next following the publication of the summons within which to appear and answer, and the law directed that the published summons should con-

tain such notice, and any other notice will be insufficient.

Hocklander vs. Hocklander, 73 Ill., 618.

Instead, however, of a summons requiring the defendants to appear by the first day of the next term of Court, commencing on the first Monday of May, 1894, the plaintiff published a summons which notified the defendants to appear, "within twenty days from the fifth day of March, 1894," thus shortening the time allowed by law, 40 days. According to this notice, the defendants must appear by March, 25th, 1894, and only seven days after the last day of publication.

When the first day of the term of Court has been fixed by statute, it is impossible that it can be changed to suit the convenience or caprice of the plaintiff. This notice, like the date of the order for publication, is by statute required to be stated in the summons, and unless so stated, the summons is void.

Odell vs. Campbell, 9 Or.

Choate vs. Spencer, 13 Montana 127.

Aetna Ins. Co. vs. Hallock, 6 Wallace, 556.

VII.

The affidavit for the order for pblication, does not

disclose the location of the office, or the post-office address of the defendant corporation, neither does it appear therefrom that any effort was made to ascertain the same.

This is an important inquiry, for the statute, (Sec. 56) provides, and the order of publication, directs that, copies of the summons and complaint shall be deposited in the post-office, and directed to the "defendant" at his place of residence. But the deputy marshal directed the papers to an officer of the corporation. This officer was not a defendant but the corporation was, and under this section the marshal has no discretion concerning the manner of service, but he must follow the statute and order, and direct the papers to the "defendant."

Scorpion Mining Co. vs. Morrisano, Nev... 375-384.

McFadden vs. Garret, 22 So Rep., 358.

The summons if sent to an officer of the corporation, might not reach the defendant. This officer was the president of the corporation, and in the nature of business affairs, such letter would—if received by the president (and even this does not appear) be delivered to the corporation—we think that is probable, but probability lacks that certainty required in matters of this nature. As said by the Supreme Court of Oregon, in Hadley vs. Heatherly, 4. Ore., 18.

"But courts will not intentionally take jurisdiction "of the person upon probabilities, and thus make up a "record that is to import absolute verity against the "person or property of a citizen when it is uncertain ""whether he has notice," and "it is a rule without "qualification or exception that when it is sought to "conclude a party by constructive service by publica- "tion, a strict compliance with the statute is required. "Nothing can be taken by intendment, and every fact "necessary to the exercise of jurisdiction based on this "mode of service must affirmatively appear in the mode "prescribed by the statute."

Gissel vs. Pulaski Co., 10 Fed. Rep. 893.

Gulpin vs. Page, 18 Wal., 366-7-8-9.

The Oregon cases announcing this doctrine, are,

Northcut vs. Lemery, 8 Ore., 316.

Odell vs. Campbell, 9 Ore., 309.

Sullivan vs. Settlemier, 97 U.S., 444.

VIII.

The decree of the District Court for the district of Alaska dismissing appellants bill should be reversed and said Court directed to enter the decree prayed for in said bill.

W. Scott Beebe,
Attorney for Appellants.

No. 126.
Reply Brf. of Beebe for Appellant.
Office Supreme Court U. S.
FILED
JAN 17 1901
JAMES H. McKENNEY
Clerk

Filed Jan. 17, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 126.

D. MARX, APPELLANT,

vs.

WILLIAM M. EBNER ET AL.

APPELLANT'S BRIEF IN REPLY.

W. SCOTT BEEBE,
Attorney for Appellant.

(17,499.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1-16-'01

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 126.

D. MARX, APPELLANT,

vs.

WILLIAM M. EBNER ET AL., APPELLEES.

APPELLANT'S BRIEF IN REPLY.

In the brief for appellees certain principles are invoked to which appellant deems it proper to reply.

I.

Appellees claim that if the court granting the order of publication "is satisfied," that in such case the law is satisfied, and that further inquiry is precluded.

Appellant maintains that no court has ever so held. In the cases cited the statutes of the States contain the same

provision as the Oregon Code, viz., that when the jurisdictional facts "appear *by affidavit to the satisfaction of the court or judge* thereof," then he may grant the order of publication, and all courts hold that he must be *legally* satisfied, and that the evidence upon which he acts must be competent and must appear affirmatively in the affidavit. Outside knowledge or rumor or belief is not sufficient and will not operate as a basis for the "satisfaction" contemplated by the statute.

Kilmer *vs.* Railroad, 37 Kansas, 84.

Alderson *vs.* Marshall, 7 Mont., 288, and cases heretofore cited.

The Oregon, Montana, and California cases certainly so decide, and this court in Galpin *vs.* Page, 85 U. S., 350, cite with approval Rickertson *vs.* Richardson, heretofore cited, and says:

"The record shows that the defendant was beyond the reach of the process of the court. All presumption of jurisdiction over her person, which otherwise might have been indulged in, is thus repelled, and it remains for the defendant to show that by the means provided by statute such jurisdiction was obtained. The statute provides in case of absent and non-resident defendants for constructive service of process by publication. It requires an order of the court or judge before such publication can be made, it designates the facts which must exist to authorize the order, and *the manner in which such facts must be made to appear.*"

In the Oregon case of McDonald *vs.* Cooper, 32 Fed., 748, the court held that legal evidence upon which the judicial mind can act must appear in the affidavit before the judge

can grant the order, and this is so held to enter directly or substantially in all the cases upon the subject.

II.

That a sale upon execution operates to pass the title notwithstanding the judgment or decree upon which it is issued is void.

This would be a monstrous doctrine, if true; but it is not the law. If the decree is void, so are all the proceedings connected with it. The section of the Oregon Code cited does not refer to void judgments, but to judgments reversed on appeal, and to voidable proceedings. If that section included void sales it would certainly be held inoperative by the courts. It would be of no more validity than an enactment that a sale upon execution might be had without judgment or without giving the defendant his day in court. Such a law would be invalid, because it operated to take a man's property without due process of law. This question is settled in appellant's favor in that State, and it is there held, in Hoxter *vs.* Poppleton, 9 Oreg., 481, that "the rule of caveat emptor applies to sheriffs' sales of real or personal property by virtue of an execution. *If the judgment is void* or has been paid, the officer's power is at an end and the purchaser takes nothing."

III.

Lastly, it is contended that appellant stood by, saw valuable improvements placed on the property without objecting thereto, and therefore is estopped from claiming

the property even, if the decree is void. In a proper case this doctrine is equitable, but it has no application in a case like this. The record does not contain one word that appellant stood by and saw improvements placed on the property, or that he was aware of the proceedings. Appellees claimed that appellants were without the district, and it nowhere appears that appellees ever expended one dollar on the property, but it does appear and is a fact that they have been very industrious in using the property, mill, and appliances placed there by the mortgagor, and have taken a large amount of gold from the mine. Again, they were holding under the purchaser at the sale, who was the plaintiff in the action. They all knew the condition of the title—their own records disclosed that—and this court has said that "where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there is no estoppel."

Brant *vs.* Coal & Iron Co., 93 U. S., 326.
Henshaw *vs.* Bissell, 18 Wall., 255.
Steel *vs.* Smelting Co., 106 U. S., 456.

Another conclusive answer to such suggestion is that appellant has no remedy other than this suit. Appellees, in the absence of the owners, went into possession of the property under abortive foreclosure proceedings. He was therefore mortgagee in possession, and could not be ousted by ejectment or other proceeding except a bill to redeem.

Cooke *vs.* Cooper, 18 Oregon, 142.

Appellant has pursued this exclusive course, and asks to have his property restored to him.

15063

Courts favor redemption, and especially in a case like this, where the property is worth many times the amount of the mortgage and interest, and where, as in this case, the mortgagee has received the income from the property, which has more than paid the incumbrance.

Respectfully submitted.

W. Scott Beebe,
Attorney for Appellant.

No. 126.
Sup. Ct. Exp. of Beebe for Clerk.
Office Supreme Court U.S.
FILED
JAN 24 1901
JAMES H. McKENNEY,
Clerk.
15065
Filed Jan. 24, 1901.

Supreme Court of the United States.

OCTOBER TERM, 1900

No. 126.

D. MARX, APPELLANT,

vs.

WM. M. EBNER ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLANT.

OFFER OR TENDER IN BILL.

"An offer in writing to pay a particular sum of money, or deliver a written instrument or specific personal property is, if not accepted, equivalent to an actual production and tender of the money instrument or property."
Oregon Code, sec. 842.

In a bill to redeem an accounting an ascertainment of the amount due is the principal object, in order that the debt may be paid. If appellant's offer to pay a certain amount was accepted the lien of the mortgage would be discharged; if not accepted an accounting would establish the amount

to be paid, and if this amount was not paid as decreed the mortgagee's title would be confirmed; therefore, it is not necessary to allege a tender in a bill to redeem.

Casserly *vs.* Witherbee, 119 N. Y., 528.
Brown *vs.* Bank, 148 Mass., 307–'8.
Sweyle *vs.* Belle, 20 Or., 328.

Respectfully submitted.

W. Scott Beebe,
Attorney for Appellant.

15066

Supreme Court U.S.
FILED
DEC 10 1900
JAMES H. McKENNEY,
Clerk.
1506

No. 126.

Br. of Davis, Dudley & McChesney for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 126.

D. MARX, *Appellant*,

vs.

WILLIAM M. EBNER AND THE EBNER GOLD MINING COMPANY.

BRIEF FOR THE APPELLEES.

HENRY E. DAVIS,
WM. W. DUDLEY,
L. T. MICHENER,
Attorneys.

R. A. FRIEDRICH,
Of Counsel.

NORMAN T. ELLIOTT PRINTING CO.

Supreme Court of the United States.

D. MARX, *Appellant*,
vs.
THE EBNER GOLD MINING COMPANY AND WILLIAM M. EBNER, *Appellees*.
No. 126.

BRIEF FOR APPELLEES.

I.

Statement of the Case.

We have not been favored with a statement in the brief for the appellant, and therefore we feel obliged to make a statement of the case as it appears of record.

The Takou Mining and Milling Company, a corporation organized under the laws of Oregon, on the 2d of August, 1889, was the owner and in possession of certain property in Alaska, and on that day it executed a note to Samuel Coulter for $98,405.91, payable ninety days from that date, and to secure the payment of the note the company executed to Samuel Coulter a mortgage upon that property. Rec., 1 and 2.

April 1, 1893, the company sold a portion of the mortgaged property to Sylvester Farrell. Rec., 2.

November 1, 1893, Samuel Coulter assigned the note and mortgage to Willis Thorp by formal deed of assignment acknowledged before a notary public. Rec., 2, 8 and 9, Exhibit "B." This instrument was filed for record in the Juneau recording district, Alaska, November 20, 1893. Rec., 9.

December 21, 1893, Willis Thorp filed in the United States District Court for the District of Alaska a suit to foreclose the mortgage, making the Takou Mining and Milling Company and Sylvester Farrell, who had purchased a portion of the property, defendants therein; and on the same day summons was issued and delivered to the marshal who made return thereon January 2, 1894, "that, after due and diligent search, neither of the within-named defendants, nor their agents, could be found within this district." Rec., 2, 3, 12, 13.

January 5, 1894, there was filed by the plaintiff an affidavit subscribed and sworn to by John G. Heid, who describes himself therein as the attorney for the plaintiff. The affidavit recites the substance of the complaint, declares its material allegations to be true within the personal knowledge of the affiant, states that the Takou Mining and Milling Company is a foreign corporation organized under the laws of the State of Oregon, and is the owner of the property described in the complaint; that the defendant, Sylvester Farrell, is not a resident of the District of Alaska but resides in the city of Portland, Oregon, and is the owner of that portion of the property

which was conveyed to him by the company April 1, 1893, subsequent to the execution of the mortgage; that no officer of the corporation resided within the District of Alaska, and that it had no managing agent or representative within the district; "that the president of the defendant corporation is Samuel Coulter, whose post-office address is No. 246 Washington street, Portland, Oregon; that the post-office address of said defendant, Sylvester Farrell, is Portland, Oregon, where said defendant Farrell resides; that affiant is ignorant of the residence number of said defendant Farrell, if any he has." The affidavit then states that summons was duly issued to the marshal and that the marshal had returned it to the clerk of the court with his return endorsed thereon to the effect that neither of the defendants could be found within the district. The affiant also deposes that the plaintiff has a good cause of action against the defendants and that the company and said Farrell are necessary and proper parties thereto, and that personal service of summons cannot be made on the defendants. Thereupon the plaintiff demanded that service of the same be made by publication. Rec., 14, 15.

January 5, 1894, Warren Truitt, Judge of the United States District Court for the District of Alaska, made a written order reciting the filing and consideration of the affidavit of John G. Heid, attorney for the plaintiff; and reciting its material averments, ordered that the service of the summons be made upon the defendants by publication in the Juneau City Mining Record, a newspaper published

at Juneau, Alaska, once a week for eight weeks, and further ordering that copies of the summons and of the complaint should be deposited forthwith in the post-office, post-paid, directed to each of said defendants at his place of residence in the State of Oregon. Rec., 15, 16. The marshal made his certificate or return, in which he showed that he had obeyed the order of the court and had duly mailed copies of the complaint and summons as directed. Rec., 16. The order and certificate were duly filed in the court. Rec., 15, 16. The plaintiff, April 4, 1894, filed an affidavit of publication made by the printer and publisher of the Juneau City Mining Record, in which he stated that the summons, a copy of which was annexed to his affidavit, was published in the newspaper once a week for nine consecutive weeks. Rec., 17. The summons will be found at Record, page 17, 18. Default was obtained May 4, 1894, at Sitka. Rec., 19.

June 7, 1895, Warren Truitt, Judge of the District Court of the United States for the District of Alaska, signed a judgment and decree of foreclosure and sale in the suit, and on the same day it was filed with the clerk, entered and spread upon the records. See Rec., 18 to 23. This decree includes among the defendants John W. Irvin, who had come into the case as plaintiff in intervention, as we gather from the decree itself. The decree also recites that Willis Thorp, the plaintiff, had duly obtained and entered an order of default against the defendants, the Takou Mining and Milling Company and Sylvester Farrell, May 4, 1894. The

decree also recites that the two defendants named were duly, regularly and legally served with summons and complaint in the action. Then follow the usual finding, order, judgment and decree.

July 12, 1895, the marshal, acting under the judgment and decree aforesaid, sold the mortgaged property to Willis Thorp for $75,000. Rec., 23, paragraphs XII, XIII.

September 12, 1895, Warren Truitt, Judge of the United States District Court for the District of Alaska, entered an order confirming the sale so made by the marshal to said Thorp for $75,000. This order recites the acts of the marshal in the premises and approves and confirms the sale so made, and directs the marshal to execute a deed to the purchaser, Willis Thorp. Rec., 24 to 26. Immediately thereafter Thorp entered into possession of the property and then conveyed it to William M. Ebner and the Ebner Gold Mining Company, to whom Thorp surrendered the possession, and ever since that time they have been and now are in possession thereof, and have been and are receiving the income and profits therefrom.

September 4, 1898, Sylvester Farrell and his wife and the said Takou Mining and Milling Company sold and conveyed all the property to the appellant, D. Marx.

November 12, 1898, D. Marx, in the District Court of the United States for the District of Alaska, brought suit against William M. Ebner and the Ebner Gold Mining Company and claimed that, by reason of the conveyance to him so made by Sylves-

ter Farrell and the Takou Mining and Milling Company September 4, 1898, he had become the owner and was entitled to the possession thereof. He averred that no suit was ever commenced in any court, nor had there been any proceedings to foreclose the mortgage other than the proceedings above described, and that the defendants had no interest in the property nor any claim thereto, except as described in his complaint. He also averred that no jurisdiction was ever obtained by that court, or any other, in any suit or proceeding, to foreclose the mortgage or to bar or devise the interest of Sylvester Farrell or the plaintiff Marx, or the Takou Mining and Milling Company in said property. Rec., 26.

It is averred in the complaint that Willis Thorp and the defendants, William M. Ebner and the Ebner Gold Mining Company, while in possession of the property, have received in the profits and income therefrom a sum equal to the amount of said mortgage and the interest thereon, except the sum of $1,000, which sum only is now due thereon, and which the plaintiff offers to pay. Rec., 26.

The complaint avers that there was no District Court of the United States for the District of Alaska at the time said proceedings were had, and that neither the complaint nor the affidavit for the order of publication of summons or subpœna, nor the summons or subpœna published, nor the order of publication or proof thereof, nor the proof of deposit in the post-office, are in accordance with the statutory requirements of the laws of Oregon or of the District of Alaska, or of the United States, in

force at the time of the proceedings, and that no valid summons or subpœna was ever issued or served personally or otherwise upon Sylvester Farrell, or upon said Takou Mining and Milling Company, nor was any valid judgment or decree ever rendered against them in the matter or proceedings in the complaint described.

The plaintiff prayed relief as follows: First, that the defendants be declared to be mortgagees in possession of the property; second, that the defendants have been fully paid the amount of the mortgage and interest, except $1,000, which they and Thorp received from the profits and income while the property was in their possession, or, if not so paid, that an accounting be had to ascertain the amount; third, that the defendants vacate the property, surrender possession thereof to the plaintiff, and that the pretended decree of foreclosure be annulled; fourth, that the plaintiff recover his costs and disbursements from the defendant. Rec., 27.

November 23, 1898, the defendant below demurred to the bill. Rec., 30, 31. January 6, 1899, the court sustained the demurrer to the bill. The plaintiff refused to plead further and elected to stand by his bill, and thereupon the court ordered and adjudged that the bill of complaint be dismissed. Rec., 32. The plaintiff Marx has appealed from that judgment to this court. For the assignment of errors, see Rec., 33, 34.

II.

Argument.

1. It is plain, we think, that the appellant here is relying upon the theory that the court below acted without sufficient power or authority in decreeing the foreclosure of the mortgage. The appellant seems to be of opinion that there was no such court as the one which undertook to foreclose the mortgage and that, if there was such court, neither complaint nor the affidavit for the order of publication, or any of the pleadings or proceedings, were sufficient in law to justify the court in entering the decree of foreclosure.

Was there a court of competent jurisdiction to hear, try and determine the foreclosure suit brought by Willis Thorp?

The civil and judicial District of Alaska was established by the act of May 17, 1884, (23 Stats. 24). The first section of that act created the District of Alaska and declared that it should "constitute a civil and judicial district." The third section of the act is as follows:

> "That there shall be, and hereby is, established a district court for said district, with the civil and criminal jurisdiction of district courts of the United States, and the civil and criminal jurisdiction of district courts of the United States exercising the jurisdiction of circuit courts, and such other jurisdiction, not inconsistent with this act, as may be established by law; and a district judge shall be appointed

for said district, who shall during his term of office reside therein and hold at least two terms of said court therein in each year, one at Sitka, beginning on the first Monday in May, and the other at Wrangel, beginning on the first Monday in November. He is also authorized and directed to hold such special sessions as may be necessary for the dispatch of the business of said court, at such times and places in said district as he may deem expedient, and may adjourn such special session to any other time previous to a regular session. He shall have authority to employ interpreters, and to make allowances for the necessary expenses of his court."

The seventh section of the act contains the following language:

"That the general laws of the State of Oregon now in force are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or the laws of the United States; and the sentence of imprisonment in any criminal case shall be carried out by confinement in the jail or penitentiary hereinafter provided for. But the said district court shall have exclusive jurisdiction in all cases in equity or those involving a question of title to land, or mining rights, or the constitutionality of a law, and in all criminal offenses which are capital.

These statutes were considered and quoted in McAllister *vs.* United States, 141 U. S., 174, 179, and the court said:

"In view of these and other provisions of that act, it is clear that the District Court for

> Alaska was invested with the powers of a District Court and a Circuit Court of the United States, as well as with general jurisdiction to enforce in Alaska the laws of Oregon, so far as they were applicable and were not inconsistent with the act and the Constitution and laws of the United States."

The appellant avers that there was no District Court of the United States for the District of Alaska at the time the proceedings complained of were had. We submit that it does not matter what name a complainant in Alaska may give the court in which he files his bill if that court has jurisdiction of the suit. Courts are neither made nor unmade by the names applied to or given them by parties. It is worthy of note, however, that in this court that District Court of Alaska has been described as "the District Court of the United States for the District of Alaska." Bennett *vs.* Harkrader, 158 U. S., 441, in which mining property was involved, and Malony *vs.* Adsit, 175 U. S., 281, which was an action in ejectment involving the title to a town lot.

In that Alaskan court, no matter what its name, there was vested a jurisdiction so wide as to cover the civil and criminal jurisdiction of District Courts of Alaska and of District Courts of the United States exercising the jurisdiction of Circuit Courts, and such other jurisdiction, not inconsistent with the act, as may be established by law, and it was also enacted that that court should have "exclusive jurisdiction in all cases in equity or those involving a question of title to land, or mining rights,

or the constitutionality of a law, and in all criminal offenses which are capital." Section 7, Act of May 17, 1884.

2. If the laws of Oregon furnished the rules of practice by which the court below was to be guided in the foreclosure of the mortgage, we submit that they were complied with by the court. The laws of Oregon provide a manner of commencing suits in equity. In section 389, page 405, Chapter 5 of Hill's Annotated Laws of Oregon, under the head of "Suits in Equity," it is enacted:

> "The provisions of Chapter 1 from and inclusive of Title 5 of such Chapter, to and inclusive of Title 8 thereof, shall apply and govern the mode of proceedings in suits, except as otherwise or specially provided in this Chapter."

The sections of the Oregon Code hereinafter cited or copied are included in Chapter 1, Title 5.

Sections 52, 53, 54 and 55 relate to the substance of the summons and the service thereof within the State.

Section 56 is as follows:

> "When service of the summons cannot be made as prescribed in the last preceding section, and the defendant after due diligence cannot be found within the State, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, or justice of the peace, in an action in a justice's court; and it also appears that a cause of action exists against the defendant, or that he is a proper party to

an action relating to real property in this State, the court or judge thereof, or a justice of the peace in an action in a justice's court, shall grant an order that the service be made by publication of a summons in either of the following cases:

"1. When the defendant is a foreign corporation, and has property within the State, or the cause of action arose therein;

"2. When the defendant, being a resident of this State, has departed therefrom with intent to defraud his creditors, or to avoid the service of the summons, or with like intent keeps himself concealed therein, or has departed from the State and remained absent therefrom six consecutive weeks;

"3. When the defendant is not a resident of the State, but has property therein, and the court has jurisdiction of the subject of the action.

"The summons published shall contain the name of the court and the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication, and the time within which the defendant is required to answer the complaint."

Section 56*a* is as follows:

"All legal notices, summonses, citations, and legal advertisements, of any description now required, or which may hereafter be required, by law to be published, may be published in any weekly newspaper of general circulation published in the county where the action, suit, or other proceeding is pending, or is to be commenced or had, in which such notice, summons, citation, or other advertisement is required to

be given: and if there be no such paper published in such county, then in the weekly newspaper of general circulation published nearest to the county seat of the county in which such action, suit, or other proceedings is pending, or is to be commenced or had."

Section 57 is as follows:

"The order shall direct the publication to be made in a newspaper published in the county where the action is commenced, and if there be no newspaper published in the county, then in a newspaper to be designated as most likely to give notice to the person to be served, and for such length of time as may be deemed reasonable, not less than once a week for six weeks. In case of publication, the court or judge shall also direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to the defendant at his place of residence, unless it shall appear that such residence is neither known to the party making the application nor can with reasonable diligence be ascertained by him. When publication is ordered, personal service of a copy of the summons and complaint out of the State shall be equivalent to publication and deposit in the post-office. In either case, the defendant shall appear and answer by the first day of the term following the expiration of the time prescribed in the order for publication, and if he does not, judgment may be taken against him for want thereof. In case of personal service out of the city, the summons shall specify the time prescribed in the order for publication."

Section 58 is as follows:

"The defendant against whom publication is

ordered, or his personal representative, on application and sufficient cause shown, at any time before judgment, shall be allowed to defend the action; and the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown and upon such terms as may be proper, be allowed to defend after judgment on such terms as may be just; and if the defense be successful, and the judgment or any part thereof have been collected or otherwise enforced, such restitution may thereupon be compelled as the court shall direct. But the title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be thereby affected."

Section 59 is as follows:

"Whenever it shall appear by the return of the sheriff, his deputy, or the person appointed to serve a summons, that the defendant is not found, the plaintiff may deliver another summons to be served, and so on, until service be had; or the plaintiff may proceed by publication as in this title provided, at his election."

Section 61 is as follows:

"Proof of the service of the summons, or of the deposit thereof, in the post-office, shall be as follows:

"1. If the service or deposit in the post-office be by sheriff or his deputy, or by a constable or marshal, the certificate of such officer; or,

"2. If by any other person, his affidavit thereof; or,

"3. In case of publication, the affidavit of the printer, or his foreman, or his principal clerk, showing the same; or,

4. "The written admission of the defendant.

"In case of service otherwise than by publication, the certificate, affidavit, or admission must state the time and place of service; and in case of deposit in the post office, the time and place thereof."

Section 62 is as follows:

"From the time of the service of the summons, or the allowance of a provisional remedy, the court shall be deemed to have acquired jurisdiction, and to have control of all the subsequent proceedings. A voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him."

The procedure provided by section 56 of the Oregon Code heretofore quoted is constitutional. Pennoyer *vs.* Neff, 95 U. S., 714; Hart *vs.* Sansome, 110 U. S., 151; Cooper *vs.* Reynolds, 10 Wall., 319; Eitel *vs.* Foote, 39 Cal., 441.

The affidavit of John G. Heid (Record, 14) shows that the Takou Mining and Milling Company is a foreign corporation, organized and existing under the laws of the State of Oregon, and has no managing agent or representative within the District of Alaska. Upon this statement of fact, it is conclusively presumed that the corporation is a citizen of the State of Oregon and incapable of citizenship or legal residence in the District of Alaska. 1 Foster's Federal Practice, section 19.

True, it might have had a managing agent or representative within the district, but that is specifically denied by the affidavit. It is also averred

in the affidavit that Sylvester Farrell is not a resident of the District of Alaska, but is a resident of the city of Portland, Oregon. The affidavit then proceeds with the statement that a summons was duly issued out of the court to the United States marshal for the District of Alaska, with directions to him to serve it upon the defendants, but the marshal has returned it to the clerk with his return thereon endorsed, that neither of the defendants could be found in the district. This return is copied on page 13 of the Record. Moreover, the affidavit of Mr. Heid states, in the concluding sentence, that service of the summons cannot be made on the defendants. The return of the marshal and the affidavit of Mr. Heid show the exercise of due diligence, as it seems to us, in the effort to find the defendants within the district.

If the marshal could have found the defendants or either of them within the district by retaining the summons in his possession for a longer time, but instead of retaining it made the return copied on page 13 of the Record, he might have rendered himself liable upon his bond, but such fact cannot justify a court of equity in setting aside the judgment rendered subsequent to the return.

We will add that the marshal was under no legal obligation to hold the summons in his possession for any particular period of time, but he discharged his duty when he satisfied himself that he could not serve either of the defendants. It may well be that between the date he received the summons, December 22, 1893, and the date of its return, January

2, 1894, he made due and diligent search for the defendants and their agents. He was only required by the law to search where he might have reasonable grounds for thinking they might be found within his district. As the property with which they had been connected was in the neighborhood of Juneau, Alaska, the official residence of the marshal, he was justifiable in making search for the defendants there and in certifying in his return that he had made due and diligent search for them, but could not find them within his district. This return is supported adequately by the affidavit of Mr. Heid, and the two taken together justified the order of publication made by the court.

In granting the order that the service be made by publication of summons, the court or judge acts judicially and can know nothing about the facts upon which the order is granted, except from the affidavit filed. Ricketson *vs.* Richardson, 26 Cal., 154. Where the affidavit for service by publication follows the language of the statute and the proceedings in other respects are regular, jurisdiction of the defendant is properly obtained. State *vs.* Adams, 56 Wis., 137.

In the case at bar, the affidavit filed and the order made by the judge were in compliance with the laws of Oregon, the proof showing that the defendants could not be found within the State after due diligence, which proof was to the *satisfaction of the judge* as required by section 56; and therefore the service by publication and mailing was sufficient to authorize the court to take jurisdiction.

It is true that ordinary diligence to obtain personal service must be shown to entitle a party to service by publication. Trullenger *vs.* Todd, 5 Oregon, 56. The record shows that the marshal received the summons for service December 22, 1893, and that after due and diligent search neither of the defendants, nor their agents, could be found within the district and the marshal made his return on the summons to that effect January 2, 1894. Rec., 13. On the following day the plaintiff filed the affidavit of John G. Heid. Rec., 14. This affidavit was made upon the personal knowledge of Mr. Heid, although it would have been sufficient had it been made on information and belief. Steinle *vs.* Beall, 12 Abb. Pr. (N. S.), 171. On the strength of this affidavit the court made the order of publication, January 5, 1894. Rec., 15, 16. *It is evident that the court was satisfied.* On the same day, as is shown by the marshal's return, Record, 16, he mailed a copy of the complaint and summons to each of the defendants, as required by the order of the court, and also by section 57 of the Oregon Code. The summons may be found. Record, 17. This is the one which was published in the "Juneau City Mining Record" in compliance with the Oregon Code, section 56*a*. It will be observed that the summons contains the name of the court, the title of the cause, a succinct statement of the relief demanded, the date of the order for service by publication, and the time within which the defendant is required to answer the complaint; all in strict compliance with the concluding sentence of section 56 of the Oregon Code.

It is true that the order of publication (Record, 15, 16) is dated "January —, 1894," but it is also shown by the endorsement thereon that it was filed with the clerk of the court January 5, 1894. Record, 16. The date of filing will supply the blank in the date of the order. It is true also that there is a statement on page 15 of the Record that Thorp filed with the clerk this order of publication and the marshal's return "on April 4, 1894." The clerk's endorsement on the back of the order, showing that it was filed with him January 5, 1894, the certificate of the marshal (Record, 16) "that in obedience of an order from the District Court of the United States for the District of Alaska, bearing date January 5, 1894," etc., and the statement in the summons that the order was "made January 5, 1894," must be taken as conclusive against the other statement or averment that the two papers were filed with the clerk April 4, 1894.

The proof of publication in the "Juneau City Mining Record" was filed April 4, 1894, and is in the form of an affidavit by E. Otis Smith, who deposes that he is the printer and publisher of the weekly newspaper printed and published in the town of Juneau, said District of Alaska, known as the "Juneau City Mining Record," in compliance with clause 3 of section 61 of the Oregon Code, requiring the affidavit of the printer, or his foreman, or his principal clerk.

The order of publication requires "that such publication be made at least once a week for eight weeks." Record, 16. The summons which was

thus required to be published required the defendants, within twenty days from the date of the service of the summons upon them, to wit, "within twenty days from the fifth day of March, A. D. 1894," to answer the complaint. Bottom of page 17, Record. The affidavit of publication (Record 17) avers that the summons "was published in said newspaper once a week for nine consecutive weeks, commencing on the 13th day of January, 1894, and ending on the 17th day of March, 1894." The order of publication required no more than a publication once a week for eight weeks. These eight publications were made January 13, 20, 27; February 3, 10, 17, 24, and March 3, 1894. The summons published required the defendants to answer "within twenty days from the fifth day of March, 1894." Thus the defendants were given their full twenty days from the 5th day of March, 1894, and they were given the eight publications as required by the order of the court. As a matter of fact, and as this Record fully discloses, the default was not entered until May 4, 1894. Record, 19. So the defendants had not only twenty days from March 5, 1894, in which to answer, but they actually had sixty days from that date. At any rate, the court having jurisdiction of the case so interpreted the order, the summons, and the publication as to justify it in entering a default May 4, 1894, and in rendering a judgment June 7, 1895, thirteen months after the default was entered.

Even had that interpretation and judgment been erroneous, the appellant and his grantors, having

stood by for several years thereafter, and having allowed great improvements to be put upon the property by reason of the appellee's faith in the judgment of the court, are now estopped from questioning that judgment on the ground that they did not have adequate or lawful notice, and they are estopped from denying appellee's title to the property under the judgment and execution sale. Kirk *vs.* Hamilton, 102 U. S., 68, and cases there cited.

In the case of Odell *vs.* Campbell, 9 Oregon 298, it was held that the proof of publication can be made only by a person holding the position of printer, or foreman, or his principal clerk. The proof of publication in the case at bar falls within the strict requirements of the code and of the decision just cited.

The only criticism that can be made by the appellant upon all these proceedings, as it seems to us, is that, from his point of view, there is no such court as the "United States District Court for the District of Alaska" named in the proceedings, record, affidavit, returns, publication, proof and decree. If the complainant in that case made a mistake in the name of the court, it is clear that he did not make a mistake in finding a court, no matter what its name, that had jurisdiction of the cause under the terms of the law which created it. Such a mistake, if it can be called a mistake, is one which could be remedied by amendment, and the law will now treat the record of that case as if it had been amended.

We submit that it is now too late to raise the question, and that, if it were not too late, the mistake, if it be one, is so trivial as to be unworthy of the serious consideration of any court.

If it be true that the term of court at Sitka, Alaska, commenced on the first Monday of May, the summons was clearly within sections 55 and 56 of the Oregon Code, requiring the defendant to appear and answer by the first day of the term following the expiration of eight weeks "prescribed in the order of publication." If the time named in the summons matured during vacation, the court not being in session at Sitka, it is unquestionable that the summons was good for the next regular term thereof, to be held after the expiration of the time named in the summons. If the court could not have been in session twenty days from March 5, 1894, that was a thing of which the defendants had to take notice. They were also required to know whether or not the court was in session at that time. They were also required to know that the next session of the court at Sitka would be in May. Moreover, the Oregon law provides that a defendant shall have until the first day of the term next following the publication of the summons within which to appear and answer. This provision of the law the court will read into the summons, and the effect of the summons is exactly the effect of the statute.

3. *Was there a rule of court prescribing the mode of procedure in equitable cases?*

We are advised by local counsel and therefore

state that at the time of filing the bill to foreclose the mortage, December 21, 1893, the District Court of Alaska had not adopted any rule prescribing the mode of procedure in equity cases, and that no other rules than those furnished by the laws of Oregon were made until 1896, when the court prescribed such rules and ordered that process in equity and admiralty should be in accordance with the practice of the Federal courts.

We are advised by local counsel and therefore state that this language is in subdivision 3, rule 4, of the District Court of Alaska, prescribed in 1896. We are also advised by local counsel and therefore state that after the adoption of this rule, and in the case of the Executor of Charles Wells against R. F. Lewis, in an unpublished opinion, Judge Delaney of the District Court of Alaska, in overruling a motion to quash a summons in an action to foreclose a mortgage on the ground that a subpœna was the only process in an equity proceeding, held that either a summons, as provided in the Oregon Code, or a subpœna as provided for under the practice in the Federal courts would confer jurisdiction, and that the complainant in the case before him might have proceeded under either practice, Oregon or Federal, for there was no statute or rule in existence at the time, either mandatory or directory, to control his action. We submit that this view of Judge Delaney is sound. The District Court of Alaska in many respects wields the powers of a State court as well as those of a Federal court. If either a State court or a Federal court similarly

situated would have had jurisdiction of the proceeding to foreclose the mortgage, then it follows that the jurisdiction in the District Court of Alaska was a concurrent one, and, under the act of March 3, 1875, giving circuit courts of the United States and State courts concurrent jurisdiction of certain causes, this action might have been brought in either, and therefore it was properly brought in the District Court of Alaska.

In the foreclosure case of Thorp *vs.* Takou Mining and Milling Company, the jurisdiction of the Federal court was not invoked by any allegation which would confer jurisdiction on a Federal court to the exclusion of the jurisdiction of a State court, for citizenship in another State than Oregon was not pleaded. On the contrary, the corporation is alleged to be a resident of Oregon. The plaintiff's residence is not given, and the inference is that he also was a resident of Oregon. As the property mortgaged was in Alaska, the suit, of course, had to be instituted in the Alaskan court. A Federal court can only acquire general equity jurisdiction in cases of diverse citizenship where it is alleged that the litigants are citizens of different States, and in order to confer this jurisdiction the bill must show affirmatively every fact necessary to give jurisdiction, the presumption being that such court has no jurisdiction. Bones *vs.* Preston, 111 U. S. 225.

Even if the jurisdiction of the Federal side of the District Court of Alaska had been invoked on the ground of citizenship, and none other, it would have been denied because it is held by this court that the

constitution and laws of the United States give jurisdiction to the circuit courts to hear and determine the rights of citizens of different States and of aliens only, that citizens of the territories and of the District of Columbia are incapable of bringing suits in such courts, and that they cannot compel citizens of such territories or of the District to appear and answer any legal or equitable procedure, nor even allow them to make voluntary appearance as defendants. 1 Foster's Fed. Prac., sec. 18, 19, and cases cited.

The circuit and district courts of the United States are limited in jurisdiction, but the District Court of Alaska has jurisdiction of every possible class of cases that can be brought in that territory regardless of the question of citizenship.

4. *Should the complainant have complied with section 738, Revised Statutes of the United States!*

That section is as follows:

> "When any defendant in a suit in equity to enforce any legal or equitable lien or claim against real or personal property within the district where the suit is brought is not an inhabitant of nor found within the said district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear, plead, answer, or demur to the complainant's bill at a certain day, therein to be designated; and the said order shall be served on such absent defendant, if practicable, wherever found, or, where such personal service is not practicable, shall be published in such manner

as the court shall direct. If such absent defendant does not appear, plead, answer, or demur within the time so limited, or within some further time to be allowed by the court in its discretion, it shall be lawful for the court; upon proof of the service or publication of the said order, and of the performance of the directions contained therein, to entertain jurisdiction, and proceed to the hearing and adjudication of such suit, in the same manner as if such absent defendant had been served with process within the said district. But the said adjudication shall, as regards such absent defendant without appearance, affect his property within such district only."

If the question be answered in the affirmative, then we respectfully submit that the proceedings in the court below in the suit to foreclose the mortgage were in compliance with the provisions of that section. The proceedings which were adopted by the complainant and by the court below not only met every requirement of section 738, but also met every requirement of the Oregon Code, as we have heretofore shown. We submit therefore that the procedure adopted in this case complied with the Code of Oregon as well as with the statute of the United States and the rules of practice governing the Federal Courts.

5. *Does it appear that the appellant Marx and those from whom he claims right and title have shown diligence?*

June 7, 1895, more than twelve months after the service and publication of summons, a final decree

was taken. Rec., 18. Then came the sale of the property and the order confirming the sale, which bears date of September 12, 1895. Rec., 24. The appellant Marx does not allege that neither he nor his assignors were ignorant of the proceedings in the case, either in whole or in part; nowhere does he deny knowledge on the part of himself or his assignors of the filing of the bill to foreclose the mortgage, and of every other step taken in connection with the suit. In the absence of such averments, the inference, as it seems to us, is plain and unmistakable that he and his assignors knew everything. It is a matter of legitimate inference therefore that they had determined to wait for the purchaser of the property to expend large sums of money in developing mines. It is inconceivable that they were ignorant of the fact that this valuable property had been taken into possession by others and was being improved and worked by them with profit. At any rate, they did not take the steps or protection that are permitted by section 58 of the Oregon Code heretofore quoted, and which gave them the right to defend the action within one year after the entry of such judgment and on such terms as might be just. The judgment was filed June 7, 1895, and under the section cited the assignors of appellant had until June 7, 1896, to come into court and be heard in defense of the action. We ask attention to the further fact that two years and five months elapsed between the filing of the suit and the rendition of judgment. Instead of taking advantage of the Oregon Code, or

of bringing such a suit in equity as they eventually brought in the court below, the appellant Marx and his assignors waited until November 12, 1898, before commencing proceedings. We submit that a want of diligence is shown here, and that the complainant does not come into court with clean hands. The inferences and presumptions and equities are all against him, and he is covered by the doctrine of Kirk *vs.* Hamilton, 102 U. S., 68, and cases cited.

6. *Can it be said of the appellant that he has done equity or has offered to do equity in the premises?*

Willis Thorp, who is the assignor of the appellees, paid $75,000 for the property at marshal's sale. Rec., 25. Thorp and his assigns have been in possession of the property ever since its sale, and that its use was of value is the inference to be drawn from the averment that the profits and income have been sufficient to pay off the mortgage of $98,405.91. Rec., 26 and 3. So it is clear that this is valuable property, and the purpose of the appellant Marx and his assignors in waiting until the six years' statute of limitations has almost run is equally clear. Shall that purpose be affected by the court on such averments as are to be found in this bill? There is in the bill no averment of restitution, or an offer to restore, or of a tender of the amount due. It is averred that Thorp paid $75,000 for the property and that its profits and income have been so great to the appellee that they will amount to enough to pay off the mortgage debt of $98,405.91, with interest at the rate of 8 per cent per annum from August 20, 1889, except $1,000. The appellant seems to

have been unmindful of the maxim that "he who would have equity must do equity." He can not escape this rule by such averments as are found in this bill, we think.

The last sentence of section 58, Oregon Code, is this: "*But title to property sold upon execution issued on such judgment, to a purchaser in good faith, shall not be thereby affected.*" There is the essence of equity!

7. *What would be the effect upon titles in Alaska if the judgment of the court below were to be reversed?*

We are advised by local counsel and therefore we assert the fact to be that since the creation of the District Court in Alaska the practice has been uniform in cases of this character and situation, and that to reverse the judgment of the court below and set aside the decree in foreclosure will be to overthrow the titles to valuable real estate in all portions of the territory, and that no other method of procedure than the one followed in the case at bar had been adoped by that court in any case where the defendant lived outside the territory. The purchasers in good faith have gone on for years improving and developing their properties, placing entire reliance in the judgments of the court, and confident in the belief that their titles were valid and beyond question. The reversal of the judgment of the court below would disturb the repose of all these titles, and not only do the appellees great injury but would work irreparable injury to

a large number of people in the territory who have acquired titles in the same way.

This manner of procedure had become the rule of practice and procedure; and in the language of Chief Justice Murray, in Siblin *vs.* Jordon, 6 Cal., 418, "A rule once established and firmly adhered to may work apparent hardship in a few cases, but in the end will have more beneficial effect than if deviated from."

In Welch *vs.* Sullivan, 8 Cal., 188, the court said:

> "Courts are permitted to exercise a wide discretion, and judges are not expected or required to overturn principles which have been considered and acted upon as correct, thereby disturbing contracts and property, and involving everything in inextricable confusion simply because some abstract principle of law had been incorrectly established in the outset. The books are full of cases in which learned judges have acknowledged the errors committed by themselves or their predecessors, and at the same time refused to overthrow the rule established. That judge who, from petty vanity and for the sake of showing himself more wise and learned than his predecessors, would overturn a rule which for years had settled the rights of property, should be regarded as the common enemy of mankind, and unworthy of the high trust that had been confided in him."

In Grignon *vs.* Astor, 2 How. (U. S.), 343, the court, by Baldwin, J., said:

> "We do not deem it necessary, now or hereafter, to retrace the reasons or the authorities on which the decisions of this court in that or

> the cases which preceded it, rested; they are founded on the oldest and most sacred principles of the common law. Time has consecrated them; the courts of the States have followed, and this court has never departed from them. They are rules of property on which the repose of the country depends; titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral action, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed than those made of the estates of decedents by order of those courts to whom the laws of the States confide full jurisdiction over the subject."

"The rule of *stare decisis*, so far as it applies to the decisions of our own court, should not be disregarded but on the fullest conviction that the law has been settled wrong; and even then we should pause and consider how far the reversal would affect transactions entered into and acted upon under the law of the court." Sydnor *vs.* Gascoigne, 11 Tex., 455.

In Harrow *vs.* Meyers, 29 Ind. 470, the court, speaking of real estate titles, said:

> "The repose of titles is important to the public. Upon the faith of these decisions our people have for a considerable period of years invested their money in real estate, the titles to which they were thus again and again assured were not liable to be disturbed."

In Rockhill *vs.* Nelson, 24 Ind, 424, the court said, by Gregory, J.:

> "We cannot change a decision without pro-

> ducing confusion in titles, as the ruling would necessarily relate back to the time the law came in force."

We deem it not irrelevant to cite the Act of Congress of April 7, 1874, in this connection. Manifestly the Congress had in mind conditions somewhat similar to those surrounding this case: and in order to prevent confusion, uncertainty and distrust, where titles had been acquired under circumstances corresponding to those under which appellees acquired theirs, it was enacted,

> "That it shall not be necessary in any of the courts of the several territories of the United States to exercise separately the common law and chancery jurisdictions, vested in said courts, and that the several codes and rules of practice adopted in said territories respectively, in so far as they authorize the mingling of said jurisdictions, or a uniform course of proceedings in all cases, whether legal or equitable, be confirmed, and that all proceedings heretofore had or taken in said courts, in conformity with said respective codes and rules of practice, so far as relates to the form and mode of proceeding, be and the same are hereby validated and confirmed."

In conclusion, we respectfully submit, that in sustaining the demurrer to appellant's complaint, the court committed no error, and its actions should be affirmed.

HENRY E. DAVIS,
WM. W. DUDLEY,
L. T. MICHENER,
Attorneys for Appellees.

R. A. FRIEDRICH, *Of Counsel.*

No. 126.

Reply Brf. of Davis, McElroy & McKenney for Appellees.

Office Supreme Court U.S.
FILED
JAN 26 1901
JAMES H. MCKENNEY
Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Jan. 26, 1901.

No. 126.

D. MARX, APPELLANT,

vs.

WILLIAM M. EBN[illegible] ET AL., APPELLEES.

Appellees' Memoranda in Response to Supplemental Brief for Appellant.

1. The statute cited is Oregon Code, section 852 [842]. This is the first section of Title I, Chapter X, page 52, Volume 1, Hill's Oregon Code. The chapter is headed, "Of Evidence in Particular Cases," etc. The title is headed, "Of Evidence in Particular Cases." The section, title, and chapter relate to evidence only—not to pleading.

2. The following Oregon cases hold that a tender must be made and pleaded: *Atkinson vs. Morrisey*, 3 Or., 332, 336, 337; *Smith vs. Foster*, 5 Or., 44; *Bartel vs. Lope*, 6 Or., 321–327; *Sellwood vs. Gray*,

11 Or., 534; *Brown vs. District*, 12 Or., 345; *Holladay vs. Holladay*, 13 Or., 523, 536, 537.

Some of these cases consider and apply the section of the Oregon Code above cited.

3. The case of *Casserly vs. Witherbee*, 119 N. Y., 528, is contrary to the overwhelming weight of authority. See 2 Jones on Mortgages, 5th ed., sec. 1088, and cases cited; also *Collins vs. Riggs*, 14 Wall., 491, 493.

4. *Brown vs. Bank*, 148 Mass., 307–8, holds that "where one occupies the position of assignee of the mortgagee, the prayer that he may be allowed to pay such sum as may be found is sufficient under the Pub. Sts. C. 181, section 17, and is to be considered as such." The statute cited expressly enacts that a person entitled to redeem may "bring a suit for redemption without a previous tender, and may in such suit offer to pay such sum as shall be found due from him."

The case is based on a positive statute and is not in point here.

5. In *Sweyle vs. Bell*, 20 Or., 323, a suit to redeem, there was a balance due of $4,034.46, and the court found that "about and prior to the commencement of this suit, the plaintiff offered to pay the estate of said Charles Sweyle the sum of $4,034.46, and served upon the defendants an offer in writing to pay the same, and that the offer was not accepted by the defendants." The court ordered the plaintiff to pay into court, for the use of the estate of Sweyle, the sum named within sixty days, and that

the defendants execute a conveyance, (See page 324.) The case went to the Supreme Court and that court, on page 328, *expressly refused to pass upon the question of the sufficiency of the tender.* Therefore the case should not have been cited by the appellant here in support of his contention.

6. "This right to an account may be extinguished by a release or an accord and satisfaction, or it may be barred by such neglect of the mortgagor to assert his claim as renders it unfair for him to insist on an account extending over the whole period of possession, and unjust towards the mortgagee to order such an account."

Russell vs. Southard, 12 How. (U. S.), 139–155.

It is submitted that the mortgagor and its assignee have been guilty of such negligence in the case at bar that they are not entitled to the relief sought.

HENRY E. DAVIS,
W. W. DUDLEY,
L. T. MICHENER,
Attorneys for Appellees.

Supreme Court of the United States.

No. 126.—October Term, 1900.

D. Marx, Appellant, vs. William M. Ebner et al. } Appeal from the District Court of the United States for the District of Alaska.

[February 25, 1901.]

The appellant has appealed from a judgment of the District Court of the United States for the District of Alaska dismissing his complaint. Both parties claim the property in dispute from a common source of title, which is the Takou Mining and Milling Company. The property consists of mining land in the Territory of Alaska, of which the defendants are in possession, and they claim title through a sale under a decree of foreclosure of a mortgage of the property by the Takou Company, which mortgage was executed at a time when the company was the owner of the property.

After the execution of the mortgage the company conveyed some, but not all, of the property covered by it to one Sylvester Farrell, subject to the mortgage, and after the foreclosure and sale under the mortgage Farrell and wife and the Takou Company sold and conveyed all of the property to the plaintiff, who claims to own the same subject to whatever may be due on the mortgage. He contends that the foreclosure proceedings under which the defendants claim title to the property were totally void, because the court in which they were conducted never obtained jurisdiction by valid service of process on the mortgagor company or upon Farrell. The facts upon which the allegation of a lack of jurisdiction was based are set out in full in the complaint, and the plaintiff asks that the defendants be decreed to be mortgagees in possession; that an accounting may be had to ascertain the exact amount due on the mortgage, which is alleged to be about $1,000, and that the defendants vacate the property and surrender the possession thereof to the plaintiff, and that the pretended decree of foreclosure be annulled.

The defendants demurred to the complaint, the court sustained it, and upon the plaintiff refusing to amend, a decree was entered finally dismissing his complaint, and from that decree he has appealed to this court.

Mr. Justice Peckham, after stating the foregoing facts, delivered the opinion of the Court.

Counsel for the appellant admits that if the foreclosure proceedings operated to pass the title to the property mortgaged, this decree must be affirmed. He contends, however, that it appears on the face of the com-

plaint that there was a want of jurisdiction in the court to render any judgment whatever in the foreclosure action, and that hence no title was conveyed to the defendants by virtue of the foreclosure decree and the sale thereunder. The record of the foreclosure action is set out in the complaint, and the ground upon which the allegation of a lack of jurisdiction is founded is the alleged defective character of the proof of the service of process by publication.

Section 56 of the code under which this service was made reads as follows:

"When service of the summons cannot be made as prescribed in the last preceding section, and the defendant after due diligence cannot be found within the State, and when that fact appears by affidavit to the satisfaction of the court or judge thereof, or justice of the peace, in an action in a justice's court; and it also appears that a cause of action exists against the defendant, or that he is a proper party to an action relating to real property in this State, the court or judge thereof, or a justice of the peace in an action in a justice's court, shall grant an order that the service be made by publication of a summons in either of the following cases."

Here follows a list of the cases in which an order for publication may be made, and it is not disputed that the case of the foreclosure of a mortgage of land within the territory was one in which such publication could be ordered.

From the record in the foreclosure action it appears that process was issued to the marshal in Alaska on the 21st of December, 1893, and that it was returned by him to the clerk's office January 2, 1894, with the following endorsement by him:

"United States of America,
District of Alaska, } *ss:*

"I hereby certify that the within summons came into my hands for service on the 22d day of December, 1893, and that after due and diligent search neither of the within-named defendants nor their agents could be found within this district.

"Dated at Juneau, Alaska, this 2d day of January, 1894."

With such summons and the return made thereon by the marshal was an affidavit made by the attorney for the plaintiff, which, among other things, stated that the defendant, the Takou Mining and Milling Company, was a foreign corporation organized and existing under the laws of the State of Oregon, and that the defendant Farrell was not a resident of the District of Alaska, but resided in the city of Portland in the State of Oregon; that the defendant corporation was the mortgagor, and that Farrell purchased from the mortgagor some of the property subsequent to the execution of the mortgage.

It also appeared from the affidavit that no officer of the defendant corporation resided within the District of Alaska, and that the corporation had no managing agent or representative within that district; that the post office address of its president was No. 246 Washington street, Port-

land, Oregon, and that Portland, Oregon, was also the post office address of the defendant Farrell; that the summons was duly issued out of the court to the United States marshal for the District of Alaska, with directions to the marshal to serve the same upon the defendants; that personal service of the summons could not be made on the defendants, and the plaintiff therefore asked an order that the service of the same might be made by publication. Upon this proof an order was made by the judge of the court, which, after reciting that it satisfactorily appeared to him that the defendants resided out of the district and could not, after due diligence, be found therein, directed the publication of the summons in a newspaper published at Juneau, Alaska, at least once a week for eight weeks. The order was dated January —, 1894, and signed by the judge. The summons was thereafter published as required by the order and a copy of the complaint was sent by mail to each of the defendants at their post office address, as directed, and as the defendants did not appear, judgment of foreclosure and sale was given, and under the decree the premises were sold and the defendants have the title which passed by the sale. The objection is made by the appellant that there was no sufficient proof that the defendants, after due diligence, could not be found, and therefore the court ordering the publication had no jurisdiction to make the order; that the simple statement of the marshal that defendants could not be found after due and diligent search was no proof that any such search had been made, and that it was necessary to show what had been done in the way of searching for defendants, so that the court could itself judge whether due diligence had been exercised. Taking the return of the officer, with the other facts proved, we think this contention not well founded.

As to the case of the corporation, it appeared that it was a foreign corporation organized under the laws of Oregon, that none of its officers resided within the District of Alaska, and that it had no managing agent or representative therein, and that its president resided in Portland, Oregon. There is also a distinct allegation in the affidavit of the attorney for the plaintiff, used to procure the order for publication, that the defendant Farrell was not a resident of the District of Alaska at the time of the making of the affidavit, and that he resided in the city of Portland, in the State of Oregon, and that personal service of the summons could not be made on him, and then there is the return of the marshal stating that the summons came into his hands on December 22, 1893, and that after due and diligent search neither of the defendants or their agents could be found within the district, and that certificate was dated January 2, 1894.

We think on these facts there was sufficient proof to give the judge jurisdiction to determine the question before him, and consequently his order for publication was valid. The order was not alone based on the statement that the defendants could not after due and diligent search be

found, but there were the other facts showing the non-residence of both parties; that there was no managing agent or representative of the corporation defendant within the district; and that neither could be personally served with process therein.

The cases referred to by the appellant are not opposed to these views. There is nothing to the contrary in *McCracken* v. *Flanagan*, (127 N. Y. 493,) cited by the appellant. At the time of that decision, section 135 of the Code of Procedure of that State provided that where the person on whom the service of summons is to be made cannot after due diligence be found within the State, and that fact appears to the satisfaction of the court or a judge thereof, &c., an order for publication may be made in the cases mentioned. The affidavit which in the above case was held insufficient stated "that defendant is a non-resident of this State nor can be found therein," leaving out the statutory words "after due diligence," and for want of those words, or of language substantially like them, the affidavit was held fatally defective, no proof of any effort to serve being given.

The case of *Kennedy* v. *New York Life Insurance &c. Company*, (101 N. Y. 487,) was cited in the opinion, and the affidavit in that case stated that the defendants "cannot after due diligence be found within this State," and that they were residents of other States named, and that the summons "was duly issued for said defendants, but cannot be served personally upon them by reason of such nonresidence." This affidavit was held to be sufficient, and the court said: "The statement as to due diligence is not absolutely an allegation of a conclusion of law or an opinion, but, in connection with what follows, a statement of facts which tend to establish that due diligence has been used."

In *McDonald* v. *Cooper*, (32 Fed. Rep. 745,) the Circuit Court of the District of Oregon held that the affidavit to obtain the order for publication must contain some evidence having a legal tendency to prove that the defendant could not be found in the State after due diligence, and the mere assertion of the fact was insufficient, but it was also held that a statement of the facts as to the residence and actual abode of the defendant, which shows beyond a peradventure that a search for him within the State would be unavailing, is sufficient. "Beyond a peradventure" is stronger language than is necessary. It is seldom that such certainty of proof is possible.

We think where the affidavit shows that the defendant is a nonresident of the district and that personal service cannot be made upon him, and the marshal or other public officer to whom the summons was delivered, returns it with his endorsement that after due and diligent search he cannot find the defendant, such proof is sufficient to give jurisdiction to the court or judge to decide the question. It is not to be expected that positive proof that the defendant cannot be found within the State or district will always be attainable. Facts must appear from which it will be a just and reason-

able inference that the defendant could not after due diligence be found, and that due diligence has been exercised, and we think such an inference is reasonable when proof is made that the defendant is a nonresident of the State, and there is an affidavit that personal service cannot be made upon him within its borders and there is a certificate of the marshal such as appears in this case. There is, too, some presumption that the public officer who has received the process for service has done his duty and has made the reasonable and diligent search for the defendant that is required. Such presumption is not alone sufficient in the absence of all proof of other facts, but when such other facts as appear in this case are sworn to, it may add some weight to them as a presumption in favor of the performance of official duty.

Within this rule the proof in this case was enough to give jurisdiction to the judge who granted the order to decide the question.

We have not overlooked the other objections made by the appellant relating to the invalidity of the decree, but we do not regard it necessary to notice them further than to say that we think they are not well founded.

The judgment of the court below is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.